No. 16-6219

RECORD
AND
BRIEFS

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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ERICK DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Seth Kretzer
The Lyric Center
440 Louisiana Street, Suite 200
Houston TX 77002
Phone: 832-460-1714
Phone: 713-343-7210
Fax: 713-224-2815
seth@kretzerfirm.com
Court-Appointed CJA Counsel
Counsel of Record for Petitioner

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ERICK DAVILA,
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United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

To the Supreme Court of the United States:

Erick Davila, a Texas death row inmate, respectfully seeks leave to proceed *in forma pauperis*. With this motion he has filed a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Mr. Davilais indigent. He has been incarcerated since his arrest and always had court-appointed lawyers. Mr. Kretzer and Mr. Landers were appointed by the U.S. District Court under the Civil Justice Act of 1964, 18 U.S.C. § 3006A, to represent Davila in his federal habeas action. Neither Mr. Kretzer or Mr. Landers

have received any funds, or the promise of any funds, from any other source other than under the Act for payment of legal fees for his habeas action.

For the reasons set forth above, Petitioner respectfully prays that this Court grant leave to proceed *in forma pauperis*.

Respectfully submitted this 22nd day of September 2016,

By: _____

Seth Kretzer
Texas BN: 24043764

The Lyric Center
440 Louisiana Street, Suite 200
Houston TX 77002
Phone: 832-460-1714
Phone: 713-343-7210
Fax: 713-224-2815
seth@kretzerfirm.com
Court-Appointed CJA Counsel
Counsel of Record for Petitioner

CJA Appointed Attorney for the
Petitioner, Rickey Lewis

CERTIFICATE OF MAILING

I hereby certify that, on the 22nd day of September 2016, this pleading was deposited with the U.S. Postal Service, in an envelope or package correctly addressed, with sufficient postage to assure delivery by certified first-class mail, R.R.R.

_____

Seth Kretzer

CERTIFICATE OF SERVICE

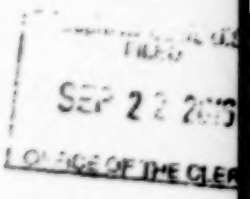
I hereby certify that, on the 22nd day of September 2016, a true and correct copy of this motion was mailed by first-class U.S. mail to:

AAG Katherine Hayes
Office of the Attorney General
Postconviction Litigation Division
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

Seth Kretzer

No. 16-6218

IN THE SUPREME COURT OF THE UNITED STATES



ERICK DANIEL DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Mr. Jonathan Landers
2817 West T.C. Jester Blvd
Houston, TX 77018

Phone: 713-685-5000
Fax: 713-685-5020

Jonathan.landers@gmail.com

Mr. Seth Kretzer
The Lyric Center
440 Louisiana Street, Suite 200
Houston TX 77002
Phone: 832-460-1714
Phone: 713-343-7210
Fax: 713-224-2815
seth@kretzerfirm.com

Appointed CJA Counsel of
Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW (CAPITAL CASE)

1. DOES THE RULE ESTABLISHED IN *MARTINEZ V. RYAN*, 132 S.CT. 1309 (2012) AND *TREVINO V. THALER*, 133 S. CT. 1911, 1921 (2013), THAT INEFFECTIVE STATE HABEAS COUNSEL CAN BE SEEN AS CAUSE TO OVERCOME THE PROCEDURAL DEFAULT OF A SUBSTANTIAL INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM, ALSO APPLY TO PROCEDURALLY DEFAULTED, BUT SUBSTANTIAL, INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS?

2. IN LIGHT OF *HURST V. FLORIDA*, 136 S. CT. 616, 622 (2016), MUST TEXAS' SECOND PUNISHMENT SPECIAL ISSUE, WHICH IS A NECESSARY FINDING FOR A SENTENCE OF DEATH, BE DECIDED BY THE JURY BEYOND A REASONABLE DOUBT?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which the Petitioner, Erick Daniel Davila, was the Petitioner before the United States District Court and the Petitioner-Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Davila is an inmate sentenced to death and is in the custody of Lorie Davis, Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The Director and his predecessors were the Respondents before the United States District Court and the Respondent-Appellees before the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW

The Fifth Circuit denied Davila's certificate of appealability and all other relief in an unpublished (revised) decision on May 31, 2016. The decision is cited as *Davila v. Davis*, No. 15-70013, 2016 WL 3171870; 2016 U.S. App. LEXIS 9681 (5th Cir. 2016) and is attached as Appendix A. The Petition for Rehearing *En Banc* was denied by form order on June 28, 2016. The District Court entered its Memorandum and Order denying all requested relief on April 21, 2015. The citation to this Memorandum and Order is *Davila v. Stephens*, 2015 WL 1808689; 2015 U.S. Dist. LEXIS 51854 (N.D. Tex. 2015) and it is attached as Appendix B.

The state habeas court adopted the prosecution's proposed "Findings of Fact and Conclusions of Law" recommending all claims be denied for lack of merit. The Texas Court of Criminal Appeals adopted the same, noted that two of the three claims were also defaulted, and denied habeas corpus relief. *Ex parte Davila*, No. WR-75,356-01, 2013 WL 1655549; (April 17, 2013) (unpublished). This Court denied certiorari. *Davila v. Texas*, 134 S. Ct. 784 (December 9, 2013). The trial court's Findings of Fact and Conclusions of Law are attached as Appendix C.

In 2011, the Texas Court of Criminal Appeals affirmed Davila's conviction and sentence on direct appeal. *Davila v. State*, No. AP-76,105, 2011 WL 303265; 2011 Tex. Crim. App. Unpub. LEXIS 43 (Tex. Crim. App. 2011) (Jan. 26, 2011) (Appendix D) and this Court denied certiorari, 132 S. Ct. 258 (Oct. 3, 2011).

STATEMENT OF JURISDICTION

The Circuit Court's amended decision was filed May 31, 2016, and Davila's timely filed Petition for Rehearing En Banc was denied on June 28, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[.]

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d) provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits on State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Texas Code of Criminal Procedure article 37.071 establishes the sentencing procedure for death penalty cases and provides, in pertinent part:

Section 2

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

. . .

(c) *The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt*, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

(2) The court shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the Texas Department of Criminal Justice for life without parole; and

(B) charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) and a negative finding on an issue submitted under Subsection (e)(1), the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) or is unable to answer any issue submitted under Subsection (b) or (e), the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole.

(*emphasis added*)

STATEMENT OF THE CASE

On April 6, 2008, Erick Davila shot at a gang rival multiple times but missed. Sadly, the bullets he fired hit and killed a grandmother and young girl. The defense argued that Davila only intended to shoot his rival, and therefore was not guilty of capital murder (as multiple intents to kill were necessary for a capital murder conviction). Although the jury seized upon this argument, as shown by questions submitted to the court during deliberations, the jury was improperly instructed as to Texas's transferred intent law in the capital murder context, and Davila was convicted.

I. GUILT AND INNOCENCE, A QUESTION OF INTENT, AND AN ERRONEOUS JURY CHARGE.

In Texas, a person can be found guilty of capital murder for intentionally killing more than one person during the same criminal transaction. Tex. Penal Code § 19.03(a)(7)(A). However, one must have the specific intent to commit two murders to be guilty of this offense; it is not enough that a person attempted to murder a single person, and accidently killed two. *See Roberts v. State*, 273 S.W.3d 322, 330 (Tex. Crim. App. 2008).

Davila's defense counsel argued from the start that the most important issue for the jury would be intent. 14 RR 16. Specifically, in their opening statement, defense counsel asked the jury to pay close attention to whether or not "Erick had the specific intent to kill these two folks, intentionally or knowingly." *Id.* at 17. The defense theme continued through closing, when defense counsel once again argued

that Erick was attempting to shoot only his rival, Jerry Stevenson, with whom he'd had previous confrontations. *See, e.g.*, 20 RR 22.

A. The shooting

On April 6, 2008, 47-year-old Annette Stevenson hosted a birthday party for her granddaughter Nautica at her residence in the Village Creek Apartments[1] in Fort Worth, Texas. 14 RR 19–21; 15 RR 42–44. Nautica's sister, brothers and several of their young cousins and friends attended the party. 14 RR 20–22; 15 RR 40, 43–44. Annette's son, Jerry Stevenson, his five-year-old daughter, Queshawn, and his three-year-old son were also in attendance. 14 RR 21, 24; 15 RR 44, 48, 54–55. Jerry Stevenson (a.k.a. Dunna, or Big Boy Dooney) was the only adult male at the house. 15 RR 42–43.

The Village Creek Apartments were known as "Blood" territory. *See, e.g.*, 14 RR 189. Indeed, Davila was a member of the Truman Street Bloods gang. 16 RR 54–64. As for Jerry Stevenson, he testified that he was not a gang member, but that he hung around many gang members. 15 RR 92–95. Specifically, he had friends who were Polywood Crips. *Id.* at 72. Stevenson recognized that the house where he lived (the scene of the shooting), was probably identified as a Crip house. *Id.* at 92–95. He further acknowledged that it could lead to problems when Crips and Bloods lived in the same area of town. *Id.*

There had been trouble just a few weeks before the shooting. Jerry Stevenson, Little Garry (Stevenson's nephew), and Jeremy (Stevenson's brother) were at

---

[1] The Village Creek Apartments consist of blocks of small single family homes or townhomes.

Stevenson's mother's house when two other men arrived and an altercation broke out. *Id.* at 73-75. At one point, one of the two men had threatened to shoot Garry. *Id.* at 75. Jerry Stevenson intervened and separated the parties. *Id.* at 75–76. He recognized one of the two men arguing with his cousin as "Mike-Mike," but he did not recognize the other person. *Id.* at 76–77. However, a security guard working at complex did recognize Davila as one of the men arguing with Stevenson. 19 RR 77–78. Stevenson also admitted that the men he was arguing with were associated with the Bloods gang. 15 RR 76–77.

On the evening of April 6, there was another birthday party going on in the apartment complex. 14 RR 55, 122–23, 241. Yvonne Watts, who lived one street over was hosting a party for her daughter. 14 RR 241. Kent Reed, his wife Arlette Keys, her 15-year-old brother Eghosa Ogierumwense, and Arlette's mother, Charlene Ogierumwense, along with several other teenagers and children, celebrated inside and outside the Watts' residence. 14 RR 55, 59–60, 122–23, 126, 240–42.

At approximately 7:30 p.m., Kent, Arlette, and Eghosa saw a black Mazda drive up and briefly stop on Luther Court. 14 RR 61, 68–69, 123–25, 242–43; 16 RR 53–56. All three watched as Davila exited from the vehicle carrying a rifle. 14 RR 61–65, 127–28, 242–44; 16 RR 71–72, 110–11, 123–31; 18 RR 140–42. Another individual moved into the driver's seat and sped away.[2] 14 RR 61, 140. Davila walked past Kent and Eghosa toward the home of a woman known as "Miss Sheila," where he stopped

[2] This person was Garfield Willis Thompson, whose capital murder charge was ultimately dismissed when he plead to a different aggravated robbery.

briefly before proceeding in the direction of the birthday party on Anderson Street. 14 RR 63, 66, 76, 130–40, 246.

Eghosa followed Davila. *Id.* at 132–34. He testified that he watched Davila stop at the corner of a house across the street from 5701 Anderson. *Id.* at 134–136. There were children outside of the house, Granny (Annette Stevenson) was on the porch, and Dooney (Jerry Stevenson) was outside. *Id.* at 136–37. Eghosa initially saw a red beam from the rifle shinning on Dooney, at which point Dooney turned around and went into the house. *Id.* at 138. Then Davila started shooting the gun. *Id.* There were women and children outside when Davila started shooting, but Eghosa never saw the beam on any of them. *Id.* Davila then ran to the middle of the street, shot again, and jumped in a car and drove off. *Id.* at 140–141. On cross examination, Eghosa explained that after Dooney walked into the house, the shooter started shooting at the house. *Id.* at 157. Shots were going everywhere. *Id.*

Annette and Queshawn Stevenson had both been fatally shot. 14 RR 142–43; 18 RR 265–78. Cashmonae, Nautica, Brianna Scott, and Sheila Moblin all suffered non-life-threatening injuries. 14 RR 26–28; 15 RR 257, 259.

B. Davila's Clinically Bad Eyesight

To support the lack of intent defense trial counsel introduced evidence showing that Davila had extremely poor eyesight. Davila was not wearing glasses at the time of the shooting. 14 RR 120. His girlfriend explained that he did not have glasses at the time of shooting, but that he needed them. 16 RR 97. An optometrist who evaluated him confirmed Davila's poor eyesight. 19 RR 91–92, 97–99. Specifically, the

prescription for Davila's right eye was 20/140, and 20/80 for the left eye. *Id.* The shooting had taken place at distances of 84 feet and nearly 100 feet from the house. 15 RR 152, 19 RR 124.

C. The jury seized on the "single intent" argument, but was given an improper jury charge virtually ensuring a capital murder conviction.

After the close of evidence, in the guilt and innocence phase, the court held the customary charge conference with the parties. 19 RR 137–159. All agreed that Davila was entitled to an instruction for the lesser included charge of murder. *Id.* at 141–43. The court instructed the jury on the lesser included offenses of murder for both Queshawn Stevenson and Annette Stevenson. *CR* at 1923–29. The defense also requested a manslaughter charge, which was given over an objection from the state. 19 RR 147–48; CR at 1923–1929.

The state never requested a transferred intent instruction as allowed by Texas Penal Code § 6.04. 19 RR 137–159. The jury was given the following instruction related to capital murder:

> **Now, If you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, In Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did Intentionally or knowingly cause the death of an Individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.**

CR at 1924 (Appendix E). The charge was given to the jury at the beginning of the day on February 19, 2009. *Id.*

In the middle of the afternoon, after the jury had been deliberating for four hours, the jury sent the following note to the judge: "In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others." *Id.* at 1931 (Appendix E). The judge responded with a misleading instruction, which did not clarify that Davila must have intended to kill two distinct people before he could be convicted of capital murder.

The Court gave the following additional charge:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, armed, or otherwise affected.

CR at 1933 (Appendix E). The defense objected to giving the jury this charge, but the objection was overruled. 20 RR 53. After receiving the incorrect charge, the jury quickly returned a guilty verdict for capital murder. CR at 1934 (Appendix E).

Davila's direct appellate counsel failed to raise this incorrect jury charge argument on direct appeal.

D. Direct appeal counsel failed to raise the jury charge claim.

Had Davila's appellate counsel raised the charge error claim on direct appeal his conviction would have been reversed. In Texas, "[t]he manner in which appellate courts analyze jury charge error is prescribed in article 36.19 of the Code of Criminal Procedure." *Heins v. State*, 157 S.W.3d 457, 460 (Tex. App.—Houston [14th Dist.] 2004, no pet.). A reviewing court first determines whether error exists in the charge, and then must determine whether the error caused harm sufficient to require

reversal. *Id.* If error was properly preserved "charging error will be affirmed only if no harm has occurred." *Murphy v. State*, 44 S.W.3d 656, 665–66 (Tex. App.—Austin 2001). As explained above, error existed in the charge because it permitted the jury to convict Davila even if the jurors believed that he intended only to harm Jerry Stevenson.

Clearly, an erroneous jury charge that precludes a defendant's sole defense harms a defendant. As *any harm at all* from this charging error would have required reversal, Davila's case would have been reversed had this issue been raised on appeal.

However, even if the objection lodged by defense counsel was not sufficient to specifically cover the charging error, relief would still have been granted. In Texas, failure to properly preserve jury charge error does not preclude review, but changes the degree of harm necessary for reversal. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). If the charging error was not preserved at the trial court level, a greater degree of harm, egregious harm, is required. *Id.* The egregious harm standard is met in cases like Davila's, where the jury charge error goes "to the basis of the case and vitally affect[s] appellant's defensive theory." *Heins v. State*, 157 S.W.3d 457, 461 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Almanza*, 686 S.W.2d at 172). The jury's note and the timing of its verdict shows that its decision clearly hinged on the requisite intent. The harm of this charging error—going directly to the sole defensive issue—was magnified by the fact that the jury immediately relied upon it to find Davila guilty.

Davila's appellate counsel was ineffective for failing to raise this jury charge error on direct appeal. Further, because the outcome of appeal is called into question by counsel's failure to raise this issue, Davila definitively establishes that he was palpably harmed by his appellate counsel's deficient performance.

E. State writ counsel failed to raise the ineffective assistance of appellate counsel claim.

Davila's state writ attorney, David Richards, failed to timely file a writ. Writ CR at 358–60. Luckily, the Texas Court of Criminal Appeals permitted an additional 180 days to file. *Id.* at 361–62. Counsel filed an 18–page writ on August 29, 2011, merely appending a mitigation report compiled by Mitigation Investigator Toni Knox.

On July 2, 2012, the trial court held a hearing on a *Wiggins* ineffective assistance of counsel claim. *See* 2 Writ-RR 1. According to an affidavit from Toni Knox, Richards did not contact her concerning the hearing until late June 2012. ROA.312-314. When they spoke on the phone on June 24, Richards did not have a copy of her report. *Id.* Knox did not feel Richards was prepared for the hearing. *Id.*

The first time that Knox met with Richards was on the date of the hearing. *Id.* They met for one hour, much of which was spent with Knox speaking with the prosecutors while Richards ordered lunch. *Id.* Knox believed that Richards was not familiar with her report, and that he made no effort to call any of the potential mitigation witnesses she had discovered. *Id.* She believed that Richards had been having health issues around the time he was working on Davila's writ, and that his impairment diminished his ability to represent Davila. *Id.*

Davila asserts that Richards was ineffective for not raising a clearly meritorious claim ineffective assistance of appellate counsel claim.

F. Federal Habeas

Davila's federal petition raised the ineffective assistance of appellate counsel claim. Although this claim was not raised in Davila's state writ, Davila argued that any potential procedural default should be excused because the principles of *Trevino* and *Martinez* apply straightforwardly to ineffective assistance of appellate counsel claims defaulted on account of ineffective state habeas counsel. ROA.475-481; ROA 223-227.

The revised Panel Opinion issued May 31, 2016, explained that the *Martinez/Trevino* exception does not apply to ineffective assistance of appellate counsel claims under Fifth Circuit authority:

> The district court rejected Davila's argument that *Martinez v. Ryan*, —U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), should extend to excuse ineffective assistance of appellate counsel claims that are defaulted due to state habeas counsel's ineffectiveness. We have addressed this possible extension of *Martinez* in at least one precedent, where we wrote that if the petitioner was "suggest[ing] that his ineffective-assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so." *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014). We do not interpret the court's declining to consider the issue to have been based on discretion.
>
> . . .
>
> In light of this controlling precedent from our court, reasonable jurists at least in this circuit would not debate the district court's conclusion that this claim of error arising from the response to the jury note was

> procedurally defaulted because Davila failed to exhaust it in state court proceedings.

Davila v. Davis, 15-70013, 2016 WL 3171870, at 4 (5th Cir. May 26, 2016)

II. DAVILA HAS CONSISTENTLY ARGUED THAT TEXAS' SENTENCING SCHEME VIOLATES THE SIXTH AMENDMENT.

A necessary finding for a sentence of death is that there are not "sufficient mitigating . . . circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." CR at 1936 (Appendix F); Tex. Crim. Proc. Code Ann. § art. 37.071(e)(1). As this finding is a necessary component for a sentence of death the Sixth Amendment requires that the finding be made by a jury and beyond a reasonable doubt, however, no burden of proof is assigned to this finding. Davila first made this argument by pre-trial motion, which was denied by the trial court. CR at 74-77.

The issue was then raised before and summarily denied by the Texas Court of Criminal Appeals: "In his fourteenth point of error, appellant asserts that the trial judge erred in overruling his motion to instruct the jury that the State bears the burden of proof concerning the lack of mitigating evidence. We have repeatedly rejected this argument." *Davila v. State*, AP-76,105, 2011 WL 303265, at *10 (Tex. Crim. App. Jan. 26, 2011).

Davila raised the issue once again in his Federal Writ of Habeas Corpus, and the Fifth Circuit upheld the District Court's denial of the claim:

> Davila argues that Article 37.071 is unconstitutional under the Sixth Amendment because it does not place the burden on the State to prove

a lack of mitigating evidence beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This claim was rejected by the Texas Court of Criminal Appeals. The district court rejected relief on this claim based on our precedent. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005).

Davila, in a letter directing us to recent relevant authority, cites to the decision in *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). There, the Supreme Court held that Florida's capital sentencing scheme violated *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556. Under the Florida scheme, a jury makes an advisory verdict while the judge makes the ultimate factual determinations necessary to sentence a defendant to death. *Hurst*, 136 S.Ct. at 621–22. The Court held that procedure was invalid because it "does not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Davila recognizes that Texas does require jurors to make all factual determinations necessary for a death sentence. His argument is that the scheme is unconstitutional because jurors do not have to find the absence of mitigating circumstances beyond a reasonable doubt. Our precedent precludes this claim. *Rowell*, 398 F.3d at 378. Reasonable jurists would not debate the district court's resolution, even after *Hurst*. *See Avila v. Quarterman*, 560 F.3d 299, 315 (5th Cir. 2009).

Davila v. Davis, 15-70013, 2016 WL 3171870, at *8 (5th Cir. May 26, 2016)

ARGUMENT: REASONS FOR GRANTING RELIEF

I. DOES THE RULE ESTABLISHED IN *MARTINEZ V. RYAN*, 132 S.CT. 1309 (2012) AND *TREVINO V. THALER*, 133 S. CT. 1911, 1921 (2013), THAT INEFFECTIVE STATE HABEAS COUNSEL CAN BE SEEN AS CAUSE TO OVERCOME THE PROCEDURAL DEFAULT OF A SUBSTANTIAL INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM, ALSO APPLY TO PROCEDURALLY DEFAULTED, BUT SUBSTANTIAL, INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS?

A. *Martinez* and *Trevino* apply to procedurally defaulted ineffective assistance of appellate counsel claims.

The Ninth Circuit has stated the issue squarely: "The Court in *Martinez* did not distinguish between trial-counsel and appellate-counsel IAC." *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013). Professors Hertz and Liebman concur:

> Although *Martinez* concerned a claim of ineffective assistance of trial counsel, and thus the Court's discussion was limited to claims of this sort . . . the Court's reasoning logically extends to other types of claims that, as a matter of state law or of factual or procedural circumstances, could not be raised before the postconviction stage.

Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.3[b] (6th ed. Supp. 2013).

Indeed, Justice Scalia recognized as much in *Martinez* when he explained that ineffective assistance of appellate counsel claims, as well as *Brady* claims and those of newly discovered exculpatory evidence, are indistinguishable from ineffective trial counsel claims for the purposes of the new exception:

> [N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised . . .

Martinez, 132 S. Ct. at 1321 (Scalia, J., dissenting).

That *Martinez* and *Trevino* necessarily apply to ineffective assistance of appellate counsel claims is not surprising based upon the reasoning behind those decisions. This is because, as the District Court recognized, such claims "do not exist to be raised on appeal" and "are logically raised, as Davila asserts, in state habeas proceedings." ROA.540.

The principles underlying *Martinez* lead to the conclusion that ineffective assistance of state habeas counsel establishes cause for a failure to raise an ineffective appellant counsel claim at the state court level. This Court has identified three factors which compel the conclusion that ineffective state habeas counsel excuses a procedural default for the failure to raise ineffective trial counsel claims. "First, the right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . Indeed, the right to counsel is the foundation for our adversary system." *Trevino v. Thaler*, 133 S. Ct. 1911 at 7 (U.S. 2013) (quotations omitted). Second, taking into account that ineffective counsel on direct appeal is cause, it only makes sense that ineffective assistance of habeas counsel should be cause for claims that cannot be raised on direct appeal. *Id.* Third, where a state channels review of certain claims into collateral proceedings, the lawyer's failure to raise those claims at the state habeas level could deprive a person of any review at all. *Id.* at 7-8.

All three factors apply straightforwardly to ineffective appellate counsel claims. This Court held over thirty years ago that "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Indeed,

Evitts v. Lucey was decided upon the intersection of the Due Process Clause found in the Fourteenth Amendment and the Sixth Amendment's right to effective counsel. 105 S.Ct. 830, 835-36 (1985). It is hard to imagine two more "bedrock principles" in our criminal justice system than Due Process and the Right to Counsel. Surely the legal parameter, to say nothing of desideratum, that we do not convict a man, or in this case, kill a man without due process of law is a bedrock principle in America. Second, seeing as ineffective assistance of appellate counsel is cause to excuse a procedural default, and seeing as it is literally impossible for someone other than state habeas counsel to raise this issue in the first instance,[3] it only makes sense that ineffectiveness of habeas counsel should excuse a petitioner's failure to raise his ineffective appellate counsel claim in state habeas proceedings. Indeed, if ineffectiveness of state habeas counsel is not cause, then quite literally, no court would ever be able to review even the most powerful ineffective appellate counsel claim when state habeas counsel failed to raise the claim. The rationale behind *Martinez* and *Trevino* apply straightforwardly to finding cause and prejudice in the instant case.

This was the same analysis used by the Ninth Circuit when they decided that *Martinez* and *Trevino* necessarily apply to ineffective assistance of counsel claims. *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013).

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[3] The state record shows that the briefing for the initial writ was filed on July 28, 2010, that the Court of Criminal Appeals denied the direct appeal on January 26, 2011, and that the state writ was not filed until August 29, 2011.

B. A Circuit-Split Has Arisen

Following *Martinez*, the circuit courts have split on the extension of *Martinez* and *Trevino* to defaulted ineffective assistance of appellate counsel claims: The Fifth, Sixth, Seventh, Eighth, and Tenth Circuits held that *Martinez* cannot be used to excuse ineffective assistance of appellate counsel claims in addition to ineffective trial counsel claims. *Long v. Butler*, 809 F.3d 299, 315 (7th Cir. 2015); *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014); *Hodges v. Colson*, 727 F.3d 517, 530-31 (6th Cir. 2013); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012) (same); *Dansby v. Norris*, 682 F.3d 711, 728-29 (8th Cir. 2012) (same), *rev'd on other grounds*, 133 S. Ct. 2767 (2013).

By contrast, as previously noted, the Ninth Circuit held that *Martinez* can be used to excuse the default of ineffective assistance of appellate counsel claims. *Nguyen v. Curry*, 736 F.3d 1287, 1289-90 (9th Cir. 2013). It should also be noted that the Supreme Court denied certiorari to address the Ninth Circuit's extension of *Martinez*. *Hurles v. Ryan*, 135 S. Ct. 710 (2014).[4]

C. This Court should grant certiorari.

This Court should grant Davila's petition for certiorari because the Fifth Circuit's decision is "in conflict with the decisions of another United States court of appeals" on the same issue. Sup. Ct. R. 10(a). The question of whether or not

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[4] The cert petition is available at 2014 WL 4075964. The first question presented was: "can post-conviction counsel's ineffectiveness provide cause to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim, or is Martinez limited to excusing only the default of a claim of ineffective assistance of trial counsel?"

ineffective state habeas counsel's performance can be seen as cause to overcome the procedural default of a substantial ineffective assistance of appellate counsel claim is also "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Indeed, without this Court's guidance petitioners in the Fifth Circuit who were denied effective representation both on direct appeal and during their initial collateral proceedings will literally have no forum to raise substantial claims of ineffective assistance of appellate counsel.

II. IN LIGHT OF *HURST V. FLORIDA*, 136 S. CT. 616, 622 (2016), MUST TEXAS' SECOND PUNISHMENT SPECIAL ISSUE, WHICH IS A NECESSARY FINDING FOR A SENTENCE OF DEATH, BE DECIDED BY THE JURY BEYOND A REASONABLE DOUBT?

Davila could only be sentenced to death after the jury unanimously agreed on two punishment "special issues." TEX. CODE CRIM. PROC. art. 37.071 § 2 (b)–(g); Appendix F (Punishment Phase Jury Instructions). Unless the jury unanimously agreed on these special issues the trial court was required to sentence Davila to life in prison. *Id.* at § 2 (g). The constitutional deficiency is that the jury was not required to make the second finding beyond a reasonable doubt.

The recent decision *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016) makes clear that the holding of *Apprendi*: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," applies to Texas' second special issue. 530 U.S. 466, 490. However, the Fifth Circuit and the Texas Court of Criminal Appeals have repeatedly rejected this argument based upon the fiction that Texas' special issues are not

prerequisites to a sentence of death. *See, e.g., Allen v. Stephens*, 805 F.3d 617 at 628 (5th Cir. 2015) ("[T]hrough the guilt-innocence phase, 'the state was required to prove beyond a reasonable doubt every finding prerequisite to exposing [the defendant] to the maximum penalty of death.'"); *Allen* v. State, 108 S.W.3d 281, 285 (Tex. Crim. App. 2003) (("Nothing the jury or judge decided during the punishment phase could have enhanced appellant's sentence beyond the prescribed range."). Texas and the Fifth Circuit refuse to recognize that the Sixth Amendment's guarantees apply to "each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619.

A. Texas' Capital Sentencing Scheme.

To be eligible for the death penalty in Texas a person must be convicted of murder committed in one of several specifically defined ways. *See* Tex. Pen. C. § 19.03, § 12.31. Jurors make the eligibility decision in the guilt/innocence phase of trial. *Id.* However, after a finding of guilt, but prior to the answering of the statutory special issues, the maximum punishment Davila could receive was life in prison.

Before a defendant may be sentenced to death in Texas, the jury must answer statutory special issues in a certain way. *See* TEX. CODE CRIM. PRO. art. 37.071 (Art. 37.071). Based on the jury's answer to the special issues the defendant will be sentenced to life in prison or death. *Id.* In Davila's case, only two special issues were submitted to the Jury. *See* CR at 1936-38 (Jury Instructions, also Included as Appendix F.). Pursuant to Art. 37.071, sec. 2(b), the jury was first asked the following question: "Do you find from the *evidence beyond a reasonable doubt* that there is a probability that the defendant would commit criminal acts of violence that would

constitute a continuing threat to society?" *Id.* at 1938 (Appendix F)(*emphasis added*). The jury was instructed that they could not answer this special issue "yes" unless they agreed unanimously and beyond a reasonable doubt. *Id.* at 1936 (Appendix F); *See* Tex. C. Crim. P. Art. 37.071(d)(2).

If the first special issue is answered in the affirmative the jury is instructed to answer the second special issue: "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentenced be imposed?" CR at 1938; See also Art. 37.071(e)(1). This special issue was adopted to meet the Eighth Amendment requirement that jurors in death penalty cases be allowed to consider all mitigation evidence when considering the death penalty. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

Importantly, Davila could only be sentenced to death *after* the jury unanimously agreed on both "special issues." TEX. CODE CRIM. PROC. art. 37.071 § 2 (b)–(g). Absent both findings, the trial court was required to sentence Davila to life in prison. TEX. CODE CRIM. PROC. art. 37.071 (g). The constitutional deficiency is that the jury was not required to make this second finding beyond a reasonable doubt.

B. *Apprendi, Ring,* and *Hurst* require a finding that Texas' capital punishment scheme violates the Sixth and Fourteenth Amendments.

In *Apprendi*, this Court considered a New Jersey statute which permitted a judge to add a "hate crime" enhancement upon finding, by a preponderance of the evidence, that the crime was motivated by racial animus. 530 U.S. at 469-470. This Court held New Jersey's "hate crime enhancement" unconstitutional because it permitted a judge, acting alone and using only a preponderance standard, to enhance the possible punishment for a crime outside the normal statutory range. The Court drew on its earlier statement in *United States v. Jones*, 526 U.S. 227, 243 n.6 (1999), that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The Court dismissed New Jersey's argument that the hate-crime finding was merely a "sentencing factor" as semantics: "Merely using the label 'sentence enhancement' to describe the [finding] surely does not provide a principled basis" for treating it differently than the substantive elements of the crime. *Id.* at 476.

In *Ring v. Arizona,* 122 S. Ct. 2428 (2002), this Court applied *Apprendi* in the capital sentencing context. The Court drew a simple rule from *Apprendi*: "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt." *Id* at 2430 (*citing Apprendi,* 530 U.S. at 482-83).

The Court accordingly struck down the Arizona statute which permitted a judge alone to make fact findings essential to the imposition of the death penalty. *Apprendi* and *Ring* teach that courts must look not to the "form" but the "effect" of statutory aggravating factors. The *Ring* Court stressed that there was simply no difference between a substantive element of the offense and a "sentencing factor," so long as that sentencing factor served to elevate the maximum permissible punishment. *Id.* at 2441. Therefore, a "sentencing factor" which makes the defendant eligible for a more severe punishment than "the maximum authorized by a guilty verdict standing alone" is simply "the functional equivalent of an element of a greater offense" and therefore must be proven in accordance with the procedures developed for ensuring a fair and impartial decision as to the defendant's guilt. *Id.* at 2443 (quoting *Apprendi*, 530 U.S. at 494 n.19).

Under *Ring* and *Apprendi*, both of the factual findings set out in TEX. CODE CRIM. PROC. art. 37.071 are not mere sentencing factors. When a defendant is convicted of capital murder in Texas the maximum punishment authorized by law is life imprisonment. *Id.* For this reason, the maximum sentence based solely on a finding of guilt in a capital murder trial is life in prison. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) ("Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*") If the State seeks death, it must prove future dangerousness, and must also prove that the defendant's mitigation facts are insufficient to justify a life

sentence and both findings must be made by a jury beyond a reasonable doubt. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).[5]

Under the Texas scheme, the jury must answer the mitigating special issue *in order to determine whether or not a death sentence will be imposed.* Although its subject matter is "mitigation," what is important, as this Court emphasized, is the "effect" of the fact-finding, not its form.[6] Functionally, the mitigation special issue operates precisely like an element of the crime - that is to say, it determines what sentence the defendant will receive. It must be determined by a process that meets relevant Constitutional standards, and *Ring Apprendi*, and *Hurst* hold that this includes a jury that is convinced beyond a reasonable doubt. *See also Sullivan v.*

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[5] The idea that *Apprendi* applies to all findings necessary for a sentence of death was further cemented in *Hurst v. Florida* where this Court held that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. 616, 619 (2016). Of course, the Sixth Amendment does not only require that jury make all necessary findings, it also requires that the finding be made beyond a reasonable doubt. *Id.* at 621 (The Sixth Amendment "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.").

[6] The fact that the mitigation special issue is mandated by the Eighth Amendment does not remove it from the Fifth and Sixth or Fourteenth Amendment analysis:

> The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence."

Ring v. Arizona, 536 U.S. 584, 606 (2002). *See also Ring*, 536 U.S. at 612 (Scalia, J. Concurring) ("*[W]hether or not* the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.).

Louisiana, 508 U.S. 275, 278 (1993) (The Due Process Clause and the Sixth Amendment require the beyond a reasonable doubt standard be used in state as well as federal proceedings.).

C. Delaware's Supreme Court agrees that all necessary findings, even those related to weighing mitigation, must be found by a jury beyond a reasonable doubt.

After this Court's decision in *Hurst* the Delaware Superior Court certified five questions to the Delaware Supreme Court in order to determine whether Delaware's capital sentencing scheme is constitutional. *See State v. Rauf*, 1509009858, 2016 WL 320094 (Del. Super. Jan. 25, 2016). One of those five questions is relevant to the issue presented here:

> If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal and state constitutional standards?

Id. Shortly thereafter, the Delaware Supreme Court accepted the certified questions, Del. Supr. No. 39, 2016, and the Superior Court stayed "all trials, penalty hearings, and applications asking [the] Court to declare Delaware's capital sentencing scheme unconstitutional." *Administrative Directive of the President Judge of the Superior Court of the State of Delaware,* Feb. 1, 2016, No.2016–2. On August 2, 2016, the Delaware Supreme Court decided that *Hurst* and its progeny require that all findings necessary for a death sentence be found by a jury and beyond a reasonable doubt. *Rauf v. State*, 39, 2016, 2016 WL 4224252, at *36 (Del. Aug. 2, 2016).

Specifically relevant here is the Court's answer to the Fourth Certified Question:

> If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?
>
> **Yes.** We answer question four in the identical manner in which we have answered question two.

Id. at 2. After a detailed and precise history of our countries strong preference for jury control over capital punishment, and of the more recent and sometimes confounding death penalty jurisprudence, Chief Justice Strine concluded as follows:

> There is no circumstance in which it is more critical that a jury act with the historically required confidence than when it is determining whether a defendant should live or die. If, as a majority of us have concluded, the Sixth Amendment requires a jury to make all the necessary factual determinations relevant to a capital defendant's fate, there is no reason to depart from the long-standing beyond a reasonable doubt standard when the jury is making the crucial fact-laden judgment of whether the defendant should be executed.[303] Put simply, the Sixth Amendment right to a jury includes a right not to be executed unless a jury concludes unanimously that it has no reasonable doubt that is the appropriate sentence.

Id. at *36.

Davila asks this Court to intervene to ensure that Texas juries also conclude unanimously and beyond a reasonable doubt that death is the appropriate sentence.

D. The Fifth Circuit and Texas fail to recognize that both special issues are a prerequisite to a finding of death.

Historically, the Fifth Circuit has held Texas' capital sentencing procedure to be constitutional because "a finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death." *Blue v. Thaler*, 665 F.3d 647, 669 (5th Cir. 2011) (citation omitted). This is the same basis relied upon by the Texas Court of Criminal Appeals in denying similar *Apprendi* claims. *See, e.g., Allen*, 108 S.W.3d at 285.

This reasoning "overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.'" *Ring v. Arizona*, 536 U.S. 584, 604 (2002) (*citing Apprendi*, 530 U.S. at 494). *Hurst* makes it abundantly clear that *Apprendi*'s holding applies to *any finding necessary for sentence of death*. And Delaware's recent decision in *Rauf* shows that *Hurst*, *Ring*, and *Apprendi* apply to any necessary finding, even if it involves mitigation.

The relevant test for applying *Apprendi* is whether or not the finding in question is a necessary prerequisite to a sentence of death. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). If a certain finding must be made prior to a death sentence being imposed, then *Apprendi* applies and the finding must be made by the jury beyond a reasonable doubt. *Id.*[7] Because Texas' second special issue must be decided in the

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[7]. In *Hurst* the analysis was straightforward:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own

negative prior to a sentence of death being imposed, that finding must be made by a jury beyond a reasonable doubt. Texas' ruling is contrary to clearly established federal law because the state court confronted a set of facts materially indistinguishable from those in *Ring* and nevertheless arrived at a different result. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) (discussing the standards of 28 U.S.C. 2254(d)). Further, Texas' decision was an unreasonable application of clearly established federal law because although the Court of Criminal Appeals correctly identified the governing legal rule it applied the rule unreasonably in Davila's case. *Id.* at 407-08.

E. Appellate courts are split about whether the Sixth Amendment applies to the selection phase of capital trials.

Multiple jurisdictions have recently commented on whether or not a defendant is entitled to the protection of the Sixth Amendment during the selection phase of a capital trial.

The Alabama Court of Criminal Appeals makes a distinction between aggravating factors and mitigation factors when applying *Apprendi*. *Ex parte State*, CR-15-0619, 2016 WL 3364689, at *8 (Ala. Crim. App. June 17, 2016). The Court believes that because the jury in Alabama must find an aggravating factor beyond a reasonable doubt, that any further findings only decrease the potential sentence and

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> fact-finding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Hurst v. Florida, 136 S. Ct. 616, 622 (2016).

therefore additional findings may be made by a judge. Indeed, that Court specifically found that the weighing of mitigation is not effected by the *Hurst* decision. *Id.* ("Whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact necessary to make a capital defendant eligible for the death penalty but is a 'moral or legal judgment' guiding the trial court's discretion in determining 'whether a defendant eligible for the death penalty should in fact receive that sentence.'") Interestingly, a few days before the *Ex parte State* ruling, this Court had granted certiorari, vacated a judgment, and remanded a case back to the Court of Criminal Appeals "for further consideration in light of *Hurst v. Florida*, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016)." *Kirksey v. Alabama*, 136 S. Ct. 2409, 195 L. Ed. 2d 777 (2016); *see also Wimbley v. Alabama*, 136 S. Ct. 2387, 195 L. Ed. 2d 760 (2016) (same); *Brooks v. Alabama*, 136 S. Ct. 708, 193 L. Ed. 2d 812 (2016) (J. Sotomayor concurring in denial of certiorari but noting that the decisions upholding Alabamas capital scheme were overruled by *Hurst*.)

The Supreme Court of Ohio agrees that *Ring*, *Apprendi*, and *Hurst* only apply to the eligibility phase of a capital trial, and that the subsequent weighing process can therefore be performed by a judge. *State v. Belton*, 2016-Ohio-1581, ¶ 59 ("Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment.") Ohio relies upon the same logic as Texas and believes that "if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for

sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is not a fact-finding process subject to the Sixth Amendment, because '[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.'" *Id.* at ¶ 60. Texas and Ohio both overlook the fact that absent a finding that aggravating factors outweigh mitigating factors the maximum sentence is life in prison.

California, like Texas, takes the position that the Sixth Amendment does not require the jury to find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. *See, e.g., People v. Rangel*, 62 Cal. 4th 1192, 1234, 367 P.3d 649, 681 (2016). *See also United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) (discussing the federal death penalty scheme and ruling that the weighing of aggravating and mitigating evidence is not a finding, but a process, and therefore no burden of proof is required.)

The State of Missouri however sides with Delaware and believes that the weighing of aggravating and mitigating evidence (along with other necessary findings) are "factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." *See State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. banc 2003); *see also McLaughlin v. Steele*, 4:12CV1464 CDP, 2016 WL 1106884, at *27 (E.D. Mo. Mar. 22, 2016) (discussing the Missouri death penalty scheme and finding that the petitioner was entitled to habeas relief where his death sentence by state court judge was based on findings of fact not made by jury in violation of his Sixth Amendment right to jury trial).

F. This Court should grant the petition for writ of certiorari

This Court should grant the petition for writ of certiorari because the Texas Court of Criminal Appeals and the Fifth Circuit have repeatedly decided an important question of federal constitutional law in way that conflicts with this Court's relevant decisions in *Apprendi*, *Ring*, and *Hurst*. Sup. Ct. R. 10(c). Further, the decisions of Texas' Court of Criminal Appeals and the Fifth Circuit are now at odds with those of the Supreme Courts of Delaware and Missouri. Sup. Ct. R. 10(a), (b). This Court should grant certiorari to establish whether or not the Sixth Amendment applies to the selection phase of capital trials.

CONCLUSION

This Court should grant the petition and order merits review.

Respectfully submitted this 22nd day of September 2016.

By: _____
Seth Kretzer
Member, Supreme Court Bar

Mr. Jonathan Landers
2817 West T.C. Jester Blvd
Houston, TX 77018

Phone: 713-301-3153
Fax: 713-685-5020

Jonathan.landers@gmail.com

Mr. Seth Kretzer
The Lyric Center
440 Louisiana Street, Suite 200
Houston TX 77002
Phone: 832-460-1714
Phone: 713-343-7210
Fax: 713-224-2815
seth@kretzerfirm.com

Appointed CJA Counsel of Record for Petitioner

1[illegible]-[illegible]210

CERTIFICATE OF MAILING

I hereby certify that, on the 22nd day of September 2016, this pleading was served on the Court via mail courier.

Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 22nd day of September 2016, a true and correct copy of this petition and appendices was sent to AAG Katherine Hayes in the Office of the Texas Attorney General.

Seth Kretzer

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BILL SENDER

CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERICK DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

Appendix

Mr. Jonathan Landers
2817 West T.C. Jester Blvd.
Houston, TX 77018

Phone: 713- 301-3153
Fax: 713-685-5020

Jonathan.landers@gmail.com

Mr. Seth Kretzer
The Lyric Center
440 Louisiana Street, Suite 200
Houston, TX 77002
Phone: 713-775-3050
Phone: 713-343-7210
Fax: 713-224-2815
seth@kretzerfirm.com

Appointed CJA Counsels of
Record for Petitioner

Appendix Description

Appendix A - *Davila v. Davis*, 15-70013, 2016 WL 3171870 (5th Cir. May 26, 2016)

Appendix B - *Davila v. Stephens*, 2015 WL 1808689; 2015 U.S. Dist. LEXIS 51854 (N.D. Tex. 2015)

Appendix C - State habeas court's Findings of Fact and Conclusions of Law

Appendix D - *Davila v. State*, No. AP-76,105, 2011 WL 303265; 2011 Tex. Crim. App. Unpub. LEXIS 43 (Tex. Crim. App. 2011) (Jan. 26, 2011)

Appendix E- Guilt and Innocence phase jury instructions and jury questions

Appendix F – Punishment phase jury instructions

CERTIFICATE OF SERVICE

I hereby certify that, on the 22nd day of September 2016, a true and correct copy of this motion was mailed by first-class U.S. mail to:

AAG Katherine Hayes
Office of the Attorney General
Postconviction Litigation Division
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

Seth Kretzer

Seth Kretzer

2016 WL 3171870
Only the Westlaw citation
is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure
32.1 generally governing citation
of judicial decisions issued on or
after Jan. 1, 2007. See also U.S.Ct.
of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

Erick Daniel Davila,
Petitioner–Appellant
v.
Lorie Davis, Director, Texas
Department of Criminal Justice,
Correctional Institutions
Division, Respondent–Appellee.

No. 15-70013
|
FILED May 26, 2016
|
REVISED May 31, 2016

Synopsis

Background: Petitioner, convicted in state court of capital murder and sentenced to death, sought habeas relief. The United States District Court for the Northern District of Texas, Reed O'Connor, J., 2015 WL 1808689, denied relief. Petitioner sought certificate of appealability (COA).

Holdings: The Court of Appeals held that:

[1] petitioner was not entitled to COA on claim that there was insufficient evidence to support conviction;

[2] petitioner was not entitled to COA on claim that his appellate counsel was ineffective;

[3] petitioner was not entitled to COA on claim that his trial counsel was ineffective;

[4] petitioner was not entitled to COA on claim that his statements should have been suppressed;

[5] petitioner was not entitled to COA on claim that Texas death penalty statute violated Eighth and Fourteenth Amendments; and

[6] petitioner was not entitled to COA on claim that Texas death penalty statute violated Sixth Amendment.

Ordered accordingly.

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:13-CV-506

Attorneys and Law Firms

Seth Kretzer, Law Offices of Seth Kretzer, Jonathan David Landers, Houston, TX, for Petitioner–Appellant.

Katherine D. Hayes, Assistant Attorney General, Office of the Attorney General,

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Criminal Appeals Division, Austin, TX, for Respondent–Appellee.

Before DENNIS, SOUTHWICK, and HAYNES, Circuit Judges.

Opinion

PER CURIAM: *

*1 Erick Daniel Davila was convicted of capital murder and sentenced to death. After pursuing relief in state court, he brought a Section 2254 action. The district court denied relief. He now seeks a certificate of appealability ("COA") from this court. We deny him a COA.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2009, a Texas jury found Davila guilty of capital murder. Davila had opened fire with a semiautomatic assault rifle on a birthday party at a home in Fort Worth, Texas, killing Annette Stevenson and her five-year-old granddaughter, Queshawn Stevenson. The birthday party was for another of Annette's granddaughters. All the guests were children or adult women, except for Jerry Stevenson, Queshawn's father.

Around 8:00 p.m., many guests were on the porch when a black Mazda passed by the house slowly, driven by a man with a gun. A few minutes later, Cashmonae Stevenson, an 11-year-old at the party, saw a man run in front of the house across the street and begin shooting at the guests on the porch. Panic ensued as the guests tried to get inside the house. Multiple children, including Cashmonae, and adult guests were shot and injured. Annette and Queshawn were the only ones to die from their injuries.

A police investigation led to the arrest of Davila, who gave four written statements over the course of seven hours in custody after his arrest. Davila was a member of the Bloods gang. Davila's third statement included admissions that he and his friend had been driving around in his girlfriend's black Mazda and decided to have a "shoot em up." He said that he was trying to shoot "the guys on the porch and ... trying to get the fat dude." He stated he did not know the name of the "fat dude," but recognized him.[1] As for the "guys on the porch," Davila appeared to have mistaken some adult women at the party for men because the only male at the party was Jerry. This confession, along with other evidence, was presented at Davila's trial and led to his conviction.

At the punishment phase, the State introduced aggravating evidence: Davila had attempted to escape from jail and seriously injured a detention officer in the process; he had committed an aggravated robbery and an additional murder only two days before the birthday party shooting; he also had been convicted for burglary of a habitation in 2006.

For the mitigation case, the defense offered testimony from Davila's father, sister, mother, maternal aunts, and a psychologist, Dr. Emily Fallis. In summary, they testified that Davila had been raised solely by a

teenage mother, with his alcoholic father having been incarcerated for murder since he was very young. Davila's mother told him that he was conceived when his father sexually assaulted her. She was neglectful, abusive, and hateful towards Davila and his sister, and even made them leave the house as teenagers. Davila's sister testified about physical fights she had with their mother. After deliberation, the jury returned a sentence of death.

*2 The Texas Court of Criminal Appeals affirmed Davila's conviction on direct appeal, and the United States Supreme Court denied a writ of certiorari. Davila then pursued state habeas relief. He petitioned the convicting court for a writ of habeas corpus, which was denied. He then sought a writ of habeas corpus from the Court of Criminal Appeals, which adopted the convicting court's findings and conclusions and denied relief. He again petitioned the Supreme Court for a writ of certiorari, which was denied.

Davila then sought federal habeas corpus relief under 28 U.S.C. § 2254. He presented seven constitutional claims:

1) The evidence at trial was insufficient to support his conviction;

2) He received ineffective assistance of trial counsel, appellate counsel, and state habeas counsel;

3) His written confession to this offense was erroneously admitted;

4) His written confession to a separate murder was erroneously admitted;

5) The trial court erroneously denied his motion to preclude the death penalty and declare Article 37.071 of the Texas Code of Criminal Procedure unconstitutional;

6) The trial court erroneously overruled his objection to Texas's "10-12 Rule"; and

7) The trial court erroneously instructed the jury about the burden of proof on mitigation.

In addition to his application for federal habeas relief, he sought an evidentiary hearing and a stay and abeyance to allow him to exhaust an ineffective assistance claim in state court. The district court reviewed the state court proceedings with the deference required by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), then denied habeas relief. The court also denied the motion for an evidentiary hearing and a stay and abeyance. The court did not certify any issue for appeal. Davila now seeks a COA from our court to allow him to proceed on appeal. *See* 28 § U.S.C. 2253(c)(1)(A).

DISCUSSION

We grant a COA only upon "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). When the district court denies an applicant's constitutional claims on the merits, a COA will only issue if

the applicant shows "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). When the district court denies an applicant's claims on procedural grounds, a COA will only issue if the applicant shows that reasonable jurists would debate whether the district court was correct in its procedural ruling and whether the petition states a valid claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

AEDPA requires federal district courts to give deference to state court decisions. *See Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005). A federal court must not grant habeas relief regarding any claim adjudicated on the merits in state court proceedings unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ... or ... resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

A state court's adjudication is "contrary to" Supreme Court precedent if: (1) the state court reaches the opposite conclusion from the Supreme Court on a question of law; or (2) the state court arrives at the opposite result of Supreme Court precedent in a case involving materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's decision is "an unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008). Even if we find that a state court incorrectly applied clearly established federal law, we can only correct the state court if the incorrect application was also objectively unreasonable. *Id.*

*3 A determination of facts by a state court is presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "This presumption of correctness attaches not only to explicit findings of fact, but also to 'unarticulated findings which are necessary to the state court's conclusion of mixed law and fact.' " *Pippin*, 434 F.3d at 788 (quoting *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003)).

We must conduct a "threshold inquiry into the underlying merit" of Davila's habeas claims to determine whether a COA should issue. *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029. This inquiry "does not require full consideration of the factual or legal bases" of the claims. *Pippin*, 434 F.3d at 787.

I. Sufficiency of the Evidence Claim

Davila asserts that there was insufficient evidence to support his conviction for capital murder because capital murder in Texas requires specific intent to kill more than one person. He claims the evidence showed

he only intended to kill one person: Jerry Stevenson.

The district court denied this claim because Davila's written statement evidenced intent to kill more than one person. Davila's statement included the following: "we were going to have a shoot em up ... The fat dude was in the middle of the street. The other 3 were on the porch.... I was trying to get the guys on the porch and I was trying to get the fat dude." The district court decided that the Texas Court of Criminal Appeals did not unreasonably apply clearly established federal law to assess sufficiency of the evidence, as set out in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[1] Davila argues that a COA should issue on whether his legal sufficiency claim should be analyzed under Section 2254(d)(1) or (d)(2). Davila asserts that the district court did not address his claim that the Texas Court of Criminal Appeals made unreasonable determinations of the facts under Section 2254(d)(2), but instead just analyzed his claim under Section 2254(d)(1). An applicant establishes legal error in the state court proceedings under Section 2254(d)(1), but factual error under Section 2254(d)(2). *See Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012). A claim of insufficient evidence is a mixed question of law and fact, which we review under Section 2254(d)(1). *See Miller v. Johnson*, 200 F.3d 274, 281, 286–88 (5th Cir. 2000). Accordingly, we deny a COA on this sub-issue because reasonable jurists would not debate the district court's resolution in light of our precedent.

[2] We must decide whether the Texas Court of Criminal Appeals' rejection of Davila's claim that the evidence was insufficient "was an objectively unreasonable application of the clearly established federal law" as set out in *Jackson*, 443 U.S. 307, 99 S.Ct. 2781. *See Martinez v. Johnson*, 255 F.3d 229, 244 (5th Cir. 2001). Evidence is sufficient if, viewing it in the light most favorable to the state prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. We look to state law to determine the substantive elements of the crime. *Coleman v. Johnson*, — U.S. —, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012). Murdering more than one person in the same criminal transaction qualifies as capital murder in Texas. TEX. PENAL CODE § 19.03(a)(7)(A). Murder requires "intentionally or knowingly caus[ing] the death of an individual." *Id.* § 19.02(b)(1). Under Texas law, a person is still "criminally responsible for causing a result if the only difference between what actually occurred and what he desired ... is that ... a different person ... was ... harmed." *Id.* § 6.04(b)(2).

*4 Davila's third written statement reveals an intent to kill at least four persons. Because there was only one man at the party, Jerry Stevenson, Davila mistook some of the adult women for men. Under Texas law, Davila's intent to kill four men transferred to the killing of Annette and Queshawn Stevenson. A rational juror could look at that evidence

and decide beyond a reasonable doubt that Davila intentionally or knowingly killed more than one person. Reasonable jurists would not find the district court's resolution debatable or wrong. We deny a COA on this claim.

II. Ineffective Assistance of Appellate Counsel Claim

Davila contends that he is entitled to a COA on his claim that his counsel in the direct appeal from his conviction was ineffective for failing to raise an allegedly erroneous jury instruction on appeal.

During deliberations, the jury sent this written question to the trial judge: "In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others[?]" The trial judge responded by giving the jury an instruction that for the first time tracked the Texas transferred-intent statute: "A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected." This additional instruction was submitted along with another instruction repeating the definitions for "intentionally" and "knowingly." Davila's trial counsel objected to the instruction on the basis that it should not have been sent to the jury until more deliberation had occurred. Davila now claims that counsel should have argued on appeal from the conviction that the additional jury instruction incorrectly stated Texas law because he had to have specific intent to murder more than one person, but the jury charge permitted him to be convicted of capital murder even if he only intended to kill Jerry Stevenson.

Because Davila did not raise this ineffective appellate counsel claim in state habeas proceedings, the district court held it was procedurally defaulted. The district court rejected Davila's argument that *Martinez v. Ryan*, —U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, — U.S. —, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), should extend to excuse ineffective assistance of appellate counsel claims that are defaulted due to state habeas counsel's ineffectiveness. We have addressed this possible extension of *Martinez* in at least one precedent, where we wrote that if the petitioner was "suggest[ing] that his ineffective-assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so." *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014). We do not interpret the court's declining to consider the issue to have been based on discretion. We must consider Section 2254 claims when they are non-defaulted, exhausted, and otherwise properly raised. Moreover, *Reed* included one citation to an opinion holding that *Martinez* made an "unambiguous holding" to the effect that "ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." *Id.* (quoting *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013)).

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[3] In light of this controlling precedent from our court, reasonable jurists at least in this circuit would not debate the district court's conclusion that this claim of error arising from the response to the jury note was procedurally defaulted because Davila failed to exhaust it in state court proceedings. *See Blue v. Thaler*, 665 F.3d 647, 669 (5th Cir. 2011) ("Because both of Blue's arguments with respect to the burden of proof on the mitigation special issue are foreclosed by Fifth Circuit precedent, the correctness of the district court's decision to reject them is not subject to debate among jurists of reason.").

*5 [4] [5] Finally, Davila challenges the district court's resolution of his motion for a stay and abeyance and motion for an evidentiary hearing. Davila sought a stay and abeyance so he could exhaust this claim in state court. A stay and abeyance is warranted when the petitioner shows there was good cause for the failure to exhaust the claim in state court, the claim is not plainly meritless, and there is no indication the failure was for delay. *See Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010). We review the denial of a stay and abeyance for abuse of discretion. *See Rhines v. Weber*, 544 U.S. 269, 277–78, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). The district court did not abuse its discretion because this claim is meritless, as discussed above, and there was no showing of good cause. Additionally, the district court did not abuse its discretion in denying Davila's request for an evidentiary hearing under Section 2254(e). *See Clark v. Johnson*, 202 F.3d 760, 765–66 (5th Cir. 2000). Here, the record itself precludes habeas relief and thus, a hearing would not enable Davila to prove factual allegations in his petition that, if true, would entitle him to relief. *See Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). We deny a COA on this claim.

III. Ineffective Assistance of Trial Counsel Claim

Davila claims his trial counsel was ineffective in failing to make a proper investigation of his background or present a mitigation case to the jury at the punishment phase under *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). This claim was presented to the Texas Court of Criminal Appeals and rejected. The district court reviewed the state court's decision[2] and held the state court's resolution of the claim was not contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and subsequent caselaw. Under *Strickland*, an ineffective assistance of trial counsel claim requires deficient performance and prejudice. *Id.* at 690–92, 104 S.Ct. 2052. Deficient performance is conduct that falls below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. Counsel must conduct a reasonable investigation into a defendant's background in order to make reasonable, strategic decisions about how to present, or whether to present, the mitigation case. *See Wiggins*, 539 U.S. at 521–23, 123 S.Ct. 2527. To show prejudice, Davila must show "a reasonable probability that ... the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. To determine prejudice in the context of mitigation evidence, the reviewing court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Our limited review is whether reasonable jurists would debate the district court's decision that the Texas court did not unreasonably apply *Strickland* and *Wiggins*.

[6] Davila argues that his trial attorneys were deficient because they failed to hire a mitigation specialist. Davila relies on the ABA Guidelines to claim that the failure to hire a mitigation specialist was deficient performance. The ABA Guidelines are only guides, not requirements, to determine whether counsel's performance was reasonable. *See Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Here, trial counsel worked together with a clinical psychologist, Dr. Emily Fallis, to investigate and evaluate mitigation evidence. Trial counsel conducted the factual investigation into Davila's background and childhood themselves, with the help of a fact investigator, because they wanted to build relationships with potential witnesses. Counsel interviewed at least 12 family members in addition to friends and employers. Counsel obtained Davila's school records and spoke to former teachers. After conducting initial interviews, counsel would send certain persons to be interviewed by Fallis. The interviews Fallis conducted allowed her to present her testimony more effectively about the impact of Davila's upbringing and background. Counsel also had Davila examined by another psychologist, neurologist, and hired another doctor with expertise in gang activity. Trial counsel made a reasonable decision to maintain responsibility for the factual investigation and to seek the assistance of an expert, Fallis, in evaluating and presenting the mitigation evidence.

*6 Davila also argues that counsel was deficient by failing to uncover additional mitigation evidence from four extended family members identified by mitigation specialist, Toni Knox, who testified at the state habeas proceeding regarding trial counsel's deficient performance. As the district court noted, two of those individuals were contacted at the time of trial but refused to testify or were otherwise uncooperative. We agree with the district court that counsel was not deficient for leaving the uncooperative family members uncalled. Additionally, as for the other two family members, counsel was not necessarily unreasonable for failing to interview them. "Questioning a few more family members ... can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." *Rompilla v. Beard*, 545 U.S. 374, 389, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Based on the investigation that counsel conducted, it was reasonable to doubt that interviews with these two extended family members would result in different, new information beyond what they already had discovered.

Furthermore, regarding any possible deficient performance in failing to interview the other two witnesses whom Knox identified, the district court held that

Davila could not show prejudice. The court concluded that the mitigation evidence Knox presented from these witnesses was of the same kind trial counsel had presented: Davila's mother was neglectful and abusive towards her children. Davila claims that the uncovered mitigation evidence would have shown more details of the type of physical abuse Davila and his sister endured. As the district court noted, such an argument "comes down to a matter of degrees" and is "even less susceptible to judicial second-guessing." *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999). The additional mitigation evidence presented by Knox "was largely cumulative and differed from the evidence presented at trial only in detail, not in mitigation thrust." *See Villegas v. Quarterman*, 274 Fed.Appx. 378, 384 (5th Cir. 2008).

Additionally, when compared to the strong aggravating evidence, any incremental increase in mitigation evidence would not create "a reasonable probability that ... the result of the proceeding would have been different." *See Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Not only were the facts of Davila's shooting of Annette and Queshawn Stevenson aggravating, but he also had a serious criminal history and had admitted to murdering another person days before the birthday party shooting. Furthermore, he attacked and seriously injured a guard while trying to escape jail prior to his trial. Finally, as the district court noted, evidence demonstrating abuse to Davila and his sister could undermine any possible mitigating effect, because his sister made different choices than Davila despite growing up in the same environment. *See Guevara v. Stephens*, 577 Fed.Appx. 364, 369 (5th Cir. 2014).

Reasonable jurists would not debate the district court's conclusion that Davila's attorneys conducted a reasonable investigation, made reasonable strategic choices, and that any other available mitigation evidence could not outweigh the aggravating evidence. We deny a COA on this claim.

IV. Suppression Issues

Davila presented four claims to the district court involving suppression of statements he made. He has grouped them together in his application for a COA. They seek suppression of Davila's oral and written statements under the Fourth, Fifth, and Sixth Amendments.

First, we address his Fourth Amendment claims. The district court held that *Stone v. Powell*, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), prevented review of Davila's Fourth Amendment claims because Davila had an opportunity to fully and fairly litigate these in state court.

[7] Davila argues that *Stone* has never been applied by the Supreme Court in a capital case. The district court noted that panels of our court have applied *Stone* in capital cases. *See, e.g., ShisInday v. Quarterman*, 511 F.3d 514, 524–25 (5th Cir. 2007). The Supreme Court has never indicated that *Stone* does not apply in capital cases. Davila argues that AEDPA should have abrogated the rule in *Stone*. Our circuit has continued to apply

Stone after AEDPA to capital cases. *See id.*; *see also Busby v. Dretke*, 359 F.3d 708, 722–23 (5th Cir. 2004); *Balentine v. Quarterman*, 324 Fed.Appx. 304, 306 (5th Cir. 2009). In light of our binding precedent, reasonable jurists would not debate the district court's determination that *Stone* barred Davila's Fourth Amendment claims if he had a full and fair opportunity to litigate them in state court.

*7 The district court noted that Davila had moved to suppress all his oral and written statements. Prior to trial, the state court held a hearing and heard evidence on Davila's Fourth Amendment claims. The state court denied Davila's motion to suppress. Davila again raised the validity of his arrest warrant during the state trial, and the trial court denied his motion again on a different basis. On direct appeal, the Texas Court of Criminal Appeals affirmed the trial court's rulings. Jurists of reason would not debate that Davila was given a full and fair opportunity to litigate his Fourth Amendment claims. *See Janecka v. Cockrell*, 301 F.3d 316, 320–21 (5th Cir. 2002).

For his Fifth and Sixth Amendment claims, Davila argues that his written statements were not voluntary because he was in "custodial interrogation for seven hours" without anything to eat or drink and without using the restroom. This claim was presented during state habeas proceedings, and the state court resolution of it must be given AEDPA deference. Whether a confession is voluntary is ultimately a legal question, which sometimes involves subsidiary mixed issues of law and fact, and accordingly, we review it under Section 2254(d)(1). *See Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir. 1998). Any purely factual sub-questions are presumed correct, unless shown to be unreasonable determinations of fact by clear and convincing evidence. *See id.*; 28 U.S.C. § 2254(d)(2), (e)(1). To determine voluntariness, we consider the "totality of the circumstances." *Rogers v. Quarterman*, 555 F.3d 483, 491 (5th Cir. 2009). "A statement is involuntary if there existed official, coercive conduct that made it unlikely the statement was a product of the individual's free choice." *Id.*

[8] The district court determined that the state court's evaluation of the voluntariness of Davila's confession was not an unreasonable application of, or contrary to, clearly established Supreme Court precedent. The state court noted that Davila never requested food, a drink, or a restroom break while he was in custody. Davila points to no clearly established federal law that the state court unreasonably applied in deciding that these facts did not show coercive or improper activity. The district court's resolution would not be debated among jurists of reason. We deny the COA on the suppression claims.

V. Claims Regarding the Texas Death Penalty Scheme

a. Violation of the Fifth Amendment Grand Jury Guarantee

[9] Davila claims that the Texas death penalty scheme, Article 37.071 of the Texas

Code of Criminal Procedure, violates the Fifth Amendment because the special issues considered at the punishment phase are not presented to the grand jury that returns the indictment. Both the Texas Court of Criminal Appeals and the district court rejected this claim because the Fifth Amendment's guarantee to a grand jury indictment has not been extended to the states through the Fourteenth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Reasonable jurists would not debate the district court's resolution in light of *Albright*. *See Kerr v. Thaler*, 384 Fed.Appx. 400, 402–03 (5th Cir. 2010). We deny the COA.

b. Violation of the Eighth and Fourteenth Amendments

Davila argues that Article 37.071 violates the Eighth and Fourteenth Amendments. Under Texas's death penalty statute, capital jurors first consider a future dangerousness special issue set out in the statute. TEX. CODE CRIM. PROC. art. 37.071 § 2(b)(1). The jury is instructed that it cannot answer "yes" to the future dangerousness issue unless it agrees unanimously, and cannot answer "no" unless ten or more jurors agree. *Id.* § 2(d)(2). If the jury answers "yes" to the future dangerousness special issue, the jury is to answer a mitigation special issue that also is in the statute. *Id.* § 2(e)(1). For that special issue, the jurors are instructed that they cannot answer "no" unless they all agree and cannot answer "yes" unless ten or more jurors agree. *Id.* § 2(f)(2). This system is called the "10-12 Rule." *Alexander v. Johnson*, 211 F.3d 895, 897 (5th Cir. 2000). The judge is to sentence the defendant to death if the jury answers the future dangerousness issue "yes" and the mitigation issue "no." TEX. CODE CRIM. PROC. art. 37.071 § 2(g). If the jury answers "no" to the future dangerousness issue, "yes" to the mitigation issue, or "is unable to answer" either issue, then a life sentence results. *Id.*; *see also Blue*, 665 F.3d at 669 (explaining TEX. CODE CRIM. PROC. art. § 37.071). Neither the court nor the parties may inform jurors that their failure to agree on an answer will result in a life sentence. *See* TEX. CODE CRIM. PROC. art. 37.071 § 2(a)(1), (g).

*8 First, Davila claims the 10-12 Rule misleads the jury on its role in the sentencing process because the jury is not told "a single juror is statutorily permitted to cause a sentence of life" by preventing unanimous agreement to the future dangerousness special issue. He argues the Texas death penalty statute, therefore, runs afoul of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). We have already rejected this argument. *See Druery v. Thaler*, 647 F.3d 535, 544 (5th Cir. 2011).

Second, he claims that the 10-12 Rule violates his right to individualized sentencing under *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Davila asserts that a reasonable juror could believe that his vote on the sentencing special issues is meaningless unless enough jurors agree with him because there is no instruction on

the effect of a lack of unanimity. We have also rejected this claim. *See Reed*, 739 F.3d at 779.

[10] Davila argues that the post-1991 Texas death penalty scheme, which now includes a true mitigation special issue under *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), has not been squarely addressed by our court. Yet, we have considered the 10-12 Rule since the 1991 changes to Article 37.071 and have held that the mitigation special issue does not violate *Mills* or *McKoy*. *See Allen v. Stephens*, 805 F.3d 617, 624, 631–33 (5th Cir. 2015). The Texas death penalty scheme does not create the possibility that reasonable jurors would think they all had to agree on particular mitigating evidence like the statute in *Mills* did; instead, each juror can independently consider mitigating evidence. *See* 486 U.S. at 384, 108 S.Ct. 1860; *see also Druery*, 647 F.3d at 543 & n.5. We have also held that this argument is barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See Hughes v. Dretke*, 412 F.3d 582, 594 (5th Cir. 2005). Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

c. Violation of the Sixth Amendment Right to Proof Beyond a Reasonable Doubt

Finally, Davila argues that Article 37.071 is unconstitutional under the Sixth Amendment because it does not place the burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This claim was rejected by the Texas Court of Criminal Appeals. The district court rejected relief on this claim based on our precedent. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005).

[11] Davila, in a letter directing us to recent relevant authority, cites to the decision in *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). There, the Supreme Court held that Florida's capital sentencing scheme violated *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556. Under the Florida scheme, a jury makes an advisory verdict while the judge makes the ultimate factual determinations necessary to sentence a defendant to death. *Hurst*, 136 S.Ct. at 621–22. The Court held that procedure was invalid because it "does not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Davila recognizes that Texas does require jurors to make all factual determinations necessary for a death sentence. His argument is that the scheme is unconstitutional because jurors do not have to find the absence of mitigating circumstances beyond a reasonable doubt. Our precedent precludes this claim. *Rowell*, 398 F.3d at 378. Reasonable jurists would not debate the district court's resolution, even after *Hurst*. *See Avila v. Quarterman*, 560 F.3d 299, 315 (5th Cir. 2009).

*9 * * *

We DENY the COA as to all claims. All pending motions are denied.

All Citations

--- Fed.Appx. ----, 2016 WL 3171870

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 Jerry Stevenson testified that neither he nor anyone who lived at Annette Stevenson's house was associated with the rival Crips gang, although he had friends who were Crips. A few weeks before this shooting, Stevenson had intervened in an argument that occurred in front of Annette's house between some of his family members and members of the Bloods gang. A security guard who witnessed the argument testified that Davila was one of the men with whom Stevenson was arguing.

2 To the extent that Davila argues the district court was not limited to the state habeas court's record under *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), because he claims his state habeas counsel was ineffective, we reject that claim. *See Escamilla v. Stephens*, 749 F.3d 380, 394–95 (5th Cir. 2014); *Ross v. Thaler*, 511 Fed.Appx. 293, 305 (5th Cir. 2013).

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70013

ERICK DANIEL DAVILA,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING EN BANC

(Opinion 5/26/16 , 5 Cir., _____, _____ F.3d _____)

Before DENNIS, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel

Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

2015 WL 1808689
Only the Westlaw citation
is currently available.
United States District Court,
N.D. Texas,
Fort Worth Division.

Erick Daniel DAVILA, Petitioner,
v.
William STEPHENS, Director,
Texas Department of Criminal
Justice, Correctional Institutions
Division, Respondent.

Civil Action No. 4:13–CV–506–O.
|
Signed April 21, 2015.

Attorneys and Law Firms

Seth Kretzer, Law Office of Seth Kretzer, Houston, TX, Jonathan David Landers, Houston, TX, for Petitioner.

Katherine D. Hayes, Office of the Texas Attorney General, Austin, TX, for Respondent.

MEMORANDUM OPINION AND ORDER

REED O'CONNOR, District Judge.

***1** Erick Daniel Davila ("Davila") petitions the Court for a writ of habeas corpus, contending that his conviction and death sentence are unconstitutional because (1) the evidence adduced at trial was insufficient to support his conviction; (2) he was denied effective assistance of counsel at trial, on direct appeal, and at state habeas proceedings; (3) the trial court erred by admitting his three written statements admitting to the commission of the offense of capital murder; (4) the trial court erred by admitting his written statement admitting to the commission of an extraneous murder offense; (5) the trial court erred by denying Davila's Motion to Preclude the Death Penalty as a Sentencing Option and Declare Tex.Crim. Proc.Code 37.071 Unconstitutional; (6) the trial court erred by overruling Davila's objection to Texas's "10–12 Rule"; and (7) the trial court erred by incorrectly instructing the jury regarding the burden of proof on the mitigation issue. Having reviewed the record, the briefs, and the exhibits tendered by the parties, the Court concludes that Davila is not entitled to relief under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), DENIES the petition, and DISMISSES this action with prejudice.

I. BACKGROUND

In February 2009, Davila was convicted and sentenced to death for the 2008 murder of an elderly woman, Annette Stevenson, and her grandchild, Queshawn Stevenson, in Tarrant County, Texas. *State v. Davila*, No. 1108359D (Crim. Dist. Ct. No. 1, Tarrant Co., Tex. Feb. 27, 2009). The Texas Court of Criminal Appeals ("CCA") affirmed the conviction in an unpublished opinion on direct appeal. *Davila v. State*, No. AP–76,105, 2011 WL 303265 (Tex.Crim.App.2011). The Court

takes the following recitation of facts from that opinion:

> On April 6, 2008, eleven-year-old Cashmonae Stevenson, along with numerous friends and relatives, celebrated her sister Nahtica's ninth birthday at a "Hannah Montana" birthday party at her grandmother's home in the Village Creek Townhouses in Fort Worth. Except for Cashmonae's uncle, Jerry Stevenson, all of the guests were women and children. About 8:00 p.m., just as the fifteen children were eating ice cream and cake on the front porch, Cashmonae saw a black Mazda slowly drive by. Inside was a man holding a gun with "a red dot" on it. Cashmonae "felt in her stomach" that something bad was going to happen because "no one ever rolled by with a gun pointed towards our house." Her uncle Jerry said, "The fool has a K in the car." And then Cashmonae heard her grandmother, Annette Stevenson, say, "They trying to find trouble."
>
> A few minutes later Cashmonae saw a man run across the field, stand next to the house in front of theirs, and start shooting with "the red dot" pointed at their porch. He kept shooting at them as the children and adults "stacked up on top of each other" as they tried to run through the front door. They were all screaming and trying to get to safe places inside. Cashmonae saw her uncle, Jerry Stevenson, lay his five-year-old daughter, Queshawn, down on the sofa. She was bleeding and looked dizzy. According to Jerry, "her guts was hanging out." After the gunshots ended, Cashmonae discovered that she had been shot in the elbow, the hand, and the shoulder. Nahtica and another little girl, Brianna, as well as Sheila Moblin, one of the adults at the party, had also been shot. Cashmonae's grandmother, Annette, had been killed, as had five-year-old Queshawn.
>
> *2 ...
>
> By the time the first police officer arrived, it was a chaotic scene. There was a dead woman-Annette Stevenson-in the back bedroom, a seriously injured child-Queshawn-on the couch in the living room, two more children with leg wounds in the dining room, blood splattered everywhere, and both adults and children screaming and trying to help or console the wounded and each other. Crime scene officers found four shell casings beside the air conditioning unit across the street and four more scattered in the street where the second series of shots had been fired. They photographed the bullet holes found all along the porch walls and in the windows of the Stevenson home.

Id. at *1–3. Following his appeal, Davila petitioned the United States Supreme Court for writ of certiorari, which was denied. *See Davila v. Texas*, — U.S. —, 132 S.Ct. 258, 181 L.Ed.2d 150 (2011). While the appeal was pending, Davila's habeas counsel petitioned the convicting court for a writ of habeas corpus. The convicting court recommended that all claims be denied. Based on the convicting court's findings and conclusions and its own review of the record, the CCA denied relief in 2013. Ex

parte Davila, No. WR–75356–01, 2013 WL 1655549 (Tex.Crim.App. Apr.17, 2013).

The Court appointed federal counsel, and Davila filed a petition for writ of habeas corpus and supporting brief on April 14, 2014 (ECF No. 16), which he amended on May 19, 2014 (ECF No. 17). Respondent filed its answer on September 4, 2014 (ECF No. 29), and Davila filed a reply on October 27, 2014 (ECF No. 33).

On May 19, 2014, Davila filed an Opposed Motion to Stay and Abet the proceedings, seeking to return to state court to exhaust his ineffective assistance of trial and appellate counsel claims. Mot. Stay, ECF No. 18. In its November 10, 2014 Order, this Court denied relief on the basis that Davila failed to establish good cause for his failure to exhaust the claims and because he failed to establish that the "unexhausted" claims were potentially meritorious. Order, Nov. 10, 2014, ECF No. 34. Davila additionally filed an Opposed Motion for Hearing on May 21, 2014, seeking an evidentiary hearing regarding the issue of whether any procedural default could be excused on the grounds of ineffective assistance of counsel rendered either on direct appeal or in state habeas proceedings. Mot. Hr'g, ECF No. 20. On November 10, 2014, this Court denied the motion without prejudice on the basis that Davila failed to identify facts that, if true, would entitle him to relief on his ineffective assistance of appellate counsel claim and on the basis that the Court had yet to address whether the state court adjudication was unreasonable. The habeas petition is now ripe for determination.

II. LEGAL STANDARD

This petition is subject to the AEDPA. *See* 28 U.S.C. § 2254. The Court will address the AEDPA standards of review where applicable to the issues raised. When a federal habeas petitioner challenges a prior state court adjudication on the merits, the AEDPA bars relitigation of the claim in federal court unless it (1) is "contrary to" federal law then clearly established in the holdings of the Supreme Court or "involved an unreasonable application of" such law, or (2) "is based on an unreasonable determination of the facts" in light of the record before the state court. *See* 28 U .S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011). This determination is limited to the record that was before the state court that adjudicated the claim on the merits. 28 U.S.C. § 2254(d)(2); *Cullen v. Pinholster*, —— U.S. ——, ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). These conditions are meant to be difficult to meet and stop short of imposing a complete bar on the relitigation of claims already rejected in state proceedings. *Richter*, 131 S.Ct. at 786.

***3** A state court's decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts governing law or confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at an different result. *Coleman v. Thaler*, 716 F.3d 895, 901 (5th Cir.2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court's application of law is "unreasonable"

when the state court identifies the correct governing legal principle but applies it unreasonably to the facts of a particular case. *Id.* at 901–02. The petitioner must show that the state court ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter,* 131 S.Ct. at 786–87; *see also White v. Woodall,* — U.S. ——, ——, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014). Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter,* 131 S.Ct. at 786; *Woodall,* 134. S.Ct. at 1702 (stating a "merely wrong" holding or "clear error" will not suffice).

Factual determinations in a state court's decision are presumed correct, and a petitioner bears the burden of rebutting them by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see Burt v. Titlow,* —U.S. ——, ——, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013). A "decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." 28 U.S.C. § 2254(d)(2); *Miller–El v. Cockrell,* 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Titlow,* 134 S.Ct. at 15 (citing *Wood v. Allen,* 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). The presumption of correctness attaches to explicit findings of fact as well as "unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Pippin v. Dretke,* 434 F.3d 782, 788 (5th Cir.2005) (quoting *Pondexter v. Dretke,* 346 F.3d 142, 148 (5th Cir.2003)). With this framework in mind, the Court turns to Davila's claims.

III. SUFFICIENCY OF THE EVIDENCE (CLAIM 1)

Davila first asserts that the evidence is legally insufficient to support his conviction for capital murder. Am. Pet. 36–45, ECF No. 17. Specifically, he contends that capital murder in Texas requires the specific intent to kill two people; thus, the evidence adduced at trial showing Davila only intended to shoot one individual is insufficient to support his conviction. *Id.* at 37. In response, Respondent argues that the evidence establishes that Davila intended to kill multiple gang members and the doctrine of transferred intent applies, which established sufficient intent to kill the two victims. Resp. 39, ECF No. 29. This claim was raised and rejected by the CCA on direct appeal.

A. Applicable Law

*4 The standard set forth in *Jackson v. Virginia* applies where an appellant challenges the legal sufficiency of the evidence presented at the trial court supporting his conviction. 443 U.S. 307, 308, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Brooks v. State,* 323 S.W.3d 893, 895 (Tex.Crim.App.2010) ("[T]he *Jackson v. Virginia* legal-sufficiency standard is the

only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt."). On federal habeas review, "the limited question before [the federal] court is whether the CCA's decision to reject [the petitioner's] sufficiency of the evidence claim ... was an objectively unreasonable application of the clearly established federal law set out in *Jackson*." *Martinez v. Johnson*, 255 F.3d 229, 244 (5th Cir.2001). The evidence is sufficient to support the jury's verdict if, viewing the evidence in the light most favorable to the verdict, any rational juror could find the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Martinez*, 255 F.3d at 244 n. 21. The *Jackson* standard is used to determine if the amount of evidence satisfies the Due Process Clause, while state law determines the substantive elements that must be proven. *Coleman v. Johnson*, — U.S. ——, ——, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012) (per curiam).

Texas Penal Code Section 19.03(a)(7)(A) provides that "[a] person commits [capital murder] if the person commits murder as defined under Section 19.02(b)(1) and ... the person murders more than one person ... during the same criminal transaction." Tex. Penal Code Ann. § 19.03(a)(7)(A) (West 2013). A person commits murder under Section 19.02(b)(1) where he "intentionally or knowingly causes the death of an individual." *Id.* at § 19.02(b)(1). In addition, under Texas law, the doctrine of transferred intent provides that a person may be held "criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that ... a different person or property was injured, harmed, or otherwise affected." *Id.* at § 6.04.

B. Evidence Presented

The CCA determined that there was "ample evidence in the record to support the jury's verdict that [Davila] intended to cause more than one death in his 'shoot em up' attack." *Davila*, 2011 WL 303265, at *4–5. Specifically, the CCA concluded that the evidence at trial established the following:

> The evidence shows that [Davila] intended to kill possible members of the Crips gang, but he mistakenly killed a grandmother and small child instead. As [Davila] himself explained, he went to "a shoot em up" in which he intended to kill "the fat dude in the middle of the street" and the three "guys on the porch." That is, he intended to shoot four males, not two females. But, under Texas law, the intent to kill four males will transfer to the unintentional killing of two females.
>
> *5 ...
>
> (1) [Davila] gave a written statement explaining that he intended to "get the fat dude" and who he mistakenly thought were three guys on the porch;
>
> (2) Cashmonae testified (as did other witnesses) that [Davila] aimed the "red dot" at "different parts of the house" and at different persons;

(3) [Davila] used a high-powered SKS semi-automatic rifle with an infrared beam to fire between ten to fifteen bullets into the group of women and children on Ms. Stevenson's front porch;

(4) [Davila] fired a burst of bullets from one location across the street, then paused as he ran to the middle of the street and fired a second burst of bullets;

(5) [A witness] said that [Davila] looked "frustrated" after the first burst of fire when [Jerry Stevenson] had escaped into the house, so [Davila] moved and then fired a second burst at the remaining women and children;

(6) [Davila] used a rifle with an infrared scope that would give him greater precision in shooting at what he intended to hit;

(7) His semi-automatic SKS required him to pull the trigger each time he intended to shoot; thus he intended to shoot his targets at least ten to fifteen different times;

(8) Expert testimony that [Davila's] choice of bullets, high-powered hollow-point bullets, was consistent with a shooter who wants to cause maximum damage or death to his intended target.

Id.

C. Analysis

Davila argues that the CCA's factual determinations were unreasonable. Am. Pet. 41, ECF No. 17. Specifically, Davila argues that the determination that "the jury's verdict showed Davila 'intended to cause more than one death in his 'shoot him up' attack' " is incorrect. *Id.* In support, he points to a note the jury sent during their deliberations. *Id.* The note stated: "In a capital murder charge, are you asking us did he intentionally murder the specific victims or are you asking us did he intend to murder a person and in the process took the lives of 2 others." Clerk's R. vol. 44 (Jury Note 2) 1931, ECF No. 10–44. Davila argues that this note "clearly established the jury believed Davila intended to murder 'a person.' " Am. Pet. 41, ECF No. 17. He further argues that the CCA improperly utilized his written statement "explaining that he intended to 'get the fat dude' and who he mistakenly thought were three guys on the porch" to establish that he intended to kill at least two individuals. *Id.* Davila argues that this was erroneous because Jerry Stevenson, whom Davila intended to kill, was the only adult male at the birthday party. *Id.* at 42. Davila further contends that the CCA incorrectly concluded that witness Cashmonae testified that Davila "aimed the 'red dot' at 'different parts of the house' and at different persons." *Id.* Finally, Davila argues that the CCA incorrectly summarized witness Eghosa Ogierumwense's testimony. *Id.* at 43–45. Although the CCA stated that Eghosa "said that [Davila] looked 'frustrated' after the first burst of fire when [Jerry Stevenson] had escaped into the house, so [Davila] moved and then fired a second burst at the remaining women and children," Eghosa actually explained that the beam from Davila's weapon was first pointed on Stevenson and then was pointed on the

windows of the home after Stevenson walked inside the home. *Id.* at 43.

***6** The Court finds support in the record establishing that Davila had the intent to kill multiple individuals. Specifically, Davila's own written statement established that he intended to shoot four members of a rival gang. In addition, the testimony also established that Davila intended, at two separate times, to kill Jerry Stevenson. *See, e.g., Ex Parte Norris,* 390 S.W.3d 338, 341 (Tex.Crim.App.2012) (noting defendant's intent to kill one individual on two separate instances was sufficient to establish capital murder under transferred intent theory). As a result, the CCA's decision to reject Davila's sufficiency of the evidence claim was not an objectively unreasonable application of the clearly established federal law set out in *Jackson. See Jackson,* 443 U.S. at 308. This claim is denied. *See* 28 U.S.C. § 2254(d)(1).

IV. ASSISTANCE OF TRIAL COUNSEL (CLAIMS 2 & 4)

Through state habeas counsel David Richards ("Richards"), Davila presented his ineffective assistance of trial counsel claim against Robert Ford and Joetta Keene ("trial counsel"). The habeas court granted Davila funding for a mitigation specialist, conducted an evidentiary hearing, and issued Findings of Fact and Conclusions of Law, recommending that the claim be denied for a lack of merit. The CCA adopted the findings of fact and conclusions of law. *Ex parte Davila,* 2013 WL 1655549.

Davila now reasserts that his trial counsel rendered ineffective assistance by failing to properly investigate and present the mitigation case. Am. Pet. 46–79, ECF No. 17. Davila further maintains that Richards was ineffective during the state writ proceedings because Richards attempted to "wing it" at the state-writ hearing and inadequately presented the ineffective assistance of trial counsel claim. *Id.* at 91–102. In response, Respondent contends that the CCA reasonably rejected the ineffective assistance of trial counsel claim on the merits, and Davila has failed to meet his burden under § 2254. Resp. 40, ECF No. 29. The Court addresses each issue in turn.

A. Applicable Law

The clearly established federal law governing claims of ineffective assistance of trial counsel is *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Williams v. Taylor,* 529 U.S. 362, 398–99, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under *Strickland,* Davila must first demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 688. The objective standard of reasonable representation is defined by prevailing professional norms and is necessarily a general standard. *See Bobby v. Van Hook,* 558 U.S. 4, 7, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009).

Restatements of professional standards, such as the American Bar Association guidelines, are "only guides" to what is reasonable and are properly considered only to the extent they describe the prevailing professional norms and standard practice, and the restatements are not so detailed

that they "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 8–9 n. 1. The Constitution imposes "one general requirement: that counsel make objectively reasonable choices." *Id.* at 9. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Pinholster,* 131 S.Ct. at 1403 (quoting *Strickland,* 466 U.S. at 690)). This standard not only gives trial counsel the benefit of the doubt, but affirmatively entertains the range of possible reasons counsel may have had for proceeding as they did. *Id.* at 1407.

*7 Trial counsel's failure to reasonably investigate and present mitigating evidence to a sentencing jury, when such evidence would have been discovered by a reasonably competent defense attorney, amounts to ineffective assistance of counsel. *Wiggins v. Smith,* 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Regarding counsel's duty to investigate, strategic decisions made by counsel following a thorough investigation are "virtually unchallengeable." *Strickland,* 466 U.S. at 690. "[S]trategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691.

Generally speaking, complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and allegations of what a witness would have stated are largely speculative. *See Gregory v. Thaler,* 601 F.3d 347, 352 (5th Cir.2010); *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir.1985). To prevail on this type of claim, the petitioner must name the witness, demonstrate that he was available to testify and would have done so, set out the content of the proposed testimony, and show that the testimony would have been favorable to a particular defense. *Id.* This showing is required for claims regarding uncalled lay and expert witnesses alike. *See, e.g., Evans v. Cockrell,* 285 F.3d 370, 377 (5th Cir.2002).

Next, Davila must demonstrate that there is a reasonable probability that prejudice, sufficient to undermine confidence in the trial outcome, resulted from counsel's deficiency. *See Strickland,* 466 U.S. at 694. A "reasonable probability" of prejudice requires a substantial, not just a conceivable, likelihood of a different outcome. *Pinholster,* 131 S.Ct. at 1403. For claims that challenge counsel's sentencing investigation, the reviewing court reconsiders the evidence in aggravation against the totality of available mitigating evidence and determines whether there is a probability, sufficient to undermine confidence in the outcome, that the jury would have assessed a life sentence. *See Wiggins,* 539 U.S. at 534. After reviewing all of the evidence, the court must ultimately "decide whether the additional mitigating evidence was so compelling that there was a reasonable probability that at least one juror could have determined that because of the defendant's reduced moral culpability,

death was not an appropriate sentence." *Id.* (internal quotation marks omitted).

B. Relevant Facts

1. *Trial Counsel's Investigation*

At the state writ hearing, trial counsel Joetta Keene testified that she spent an estimated time of 100 hours and co-counsel Robert Ford spent an estimated time of 80 hours on the mitigation investigation alone.[1] State Habeas Rep. R. (vol.2) 27, 37. Keene testified that she and Ford met with multiple doctors. *Id.* at 37. Keene noted that although she and Ford worked with psychologist Dr. Emily Fallis ("Dr.Fallis") in preparing a PowerPoint presentation for trial, Keene and Ford remained in charge of the mitigation investigation. *Id.* at 27–28, 37. Because Davila had made an attempted escape from jail, Keene stated she felt the mitigation case was the "real issue" for purposes of punishment. She believed the mitigation investigation should not be delegated because she had to build relationships with her witnesses first. *Id.* at 28. So, with the help of their fact investigator, Keene and Ford would find and talk to witnesses. They would then refer certain persons to Dr. Fallis, who would interview them from the psychologist's standpoint. *Id.* Davila was also submitted for a psychological evaluation with Dr. Kelly Goodness and neurological testing with Dr. Dennis Zgaljardic. *Id.* at 8, 30. Keene noted that she and Ford spoke with many of Davila's former teachers, his employer, and many of his family members.[2] *Id.* at 30, 33–34.

2. *Aggravating Evidence*

*8 The State introduced evidence that Davila attempted to escape from jail while awaiting trial, committed an aggravated robbery and an additional murder only two days before this capital offense, and was convicted of burglary of a habitation two years earlier. The State also introduced evidence of a traffic stop where a gun and marijuana were found in Davila's car and testimony about his presence as a security threat in the jail.

The State first called Gabriel Ramos who testified about an incident wherein Davila and two other individuals held Ramos and Ramos's boss at gunpoint while demanding money. Trial Tr. vol. 20 at 65:17–24, ECF No. 11–22. Ramos related that the robbery occurred at 5:00 in the morning on April 4, 2008. *Id.* at 104:7–19. He noted that Davila held a gun to Ramos's boss's head while demanding that he give Davila all of his money. *Id.* at 89:1–5. At one point, one of Davila's cohorts feared that the cops were near and advised that they should leave. *Id.* at 91:5–25. Davila then released Ramos's boss and started to retreat to his vehicle. *Id.* However, as he was doing so, he stopped and returned to Ramos's boss and again placed his gun on his head. *Id.* It was only at Davila's cohorts' insistence that Davila returned to his own vehicle and left the scene. *Id.* at 91:19–25, 92:1–2. Ramos noted that it appeared that Davila was in charge of the robbery. *Id.* at 106:17–20.

The jury next heard from Detective Thomas Wayne Boetcher. Detective Boetcher took

Davila's written confession regarding the extraneous murder of Darrell Ford and read the written confession to the jury:

> On the first part of the month, it was 4 Trey Day, April the 3rd. That's how I remember the day. I went to the convenience store on East Lancaster by the French Quarters. A friend of mine named Taylor *[sic]* was with me. We call him T. He hangs around East Lancaster. He wears red. He is not put down with any particular set.
>
> I was driving Nichcole's car, and Taylor was with me on the passenger side. We both went into the store, and when I came out and started up the car, I let my window down on the driver's side, and then this old school man walked up to me. He was a black male about 37 years old. He walked up to me on the driver's side of the car while I was sitting in it. He didn't say nothing to me, he just pulled a pistol out on me and pointed it to my head.
>
> I thought I was going to die in the car. I wait-I waited for Taylor, and he didn't come out. I–I told-I told him what happened, and he was surprised. We hung around the back of the apartments and smoking. We stayed out there all day, and finally went to leave around 4:00 a.m.
>
> ...
>
> When we went to leave, we seen the dude talking to the lady and another dude. We were in the front of the store. The store was closed, and I got the strap from the back of the apartments earlier to get him. I told Tyler to let me off on East Lancaster, and I was going to walk up there.
>
> *9 I went up to the store, and I was walking-as I was walking to him, the guy said to me, what's up? And then he said, What's up G Money? I said, What, and I let him have it. I shot him as he walked towards me, and then I went and got back in the car with Tyler and went home. I shot him because he had drawn down on me earlier in the day and pointed a gun at my head.

Trial Tr. vol. 21 at 21:8–25, 22:1–5, 23:3–16, ECF No. 11–23.

Tanna Martinez, who was with Darrell Ford when he was shot, next testified. Martinez noted that she was a prostitute and Ford dealt illegal drugs and "watched out" for Martinez while she "was jumping in and out of cars, making sure nothing happened to [her]." *Id.* at 72:3–12, 73:18–25. She testified that on the evening of April 3, 2008, she and Ford were standing on the corner after just having smoked crack, when a black vehicle drove past them. *Id.* at 76:1–6. Martinez noted that the she and Ford noticed the vehicle because they thought the driver was looking to pick up a prostitute. *Id.* at 77:16–25, 78:1–2. They noticed that when the vehicle first drove past them, it had two occupants, but when it drove past them again, it only had one. *Id.* She then related that she then saw a man, who she later identified as Davila, walking towards her and Ford. *Id.* at 78:20–24. Davila held his head down and did not say anything to them. *Id.* Ford then asked Davila, "What's up," and Davila did not respond. *Id.* Davila then

pulled out a gun and Ford told Martinez to turn and run. *Id.* at 79:3–9. Martinez turned to run, but then fell. *Id.* She then heard "pow, pow" and turned back around and saw that Ford had begun to run, but then hit the ground. *Id.* She noted that Davila then walked over to Ford and shot him four more times in the back. *Id.* at 79:11–12.

The jury later heard that Davila had previously been convicted and sentenced to prison on May 11, 2006, for the offense of burglary of a habitation. Trial Tr. vol. 22 at 30:1–5, ECF No. 11–24. Davila was sentenced to three years confinement. *Id.*

The jury also heard from Arlington Police Officer Michael Moses. Officer Moses testified that he conducted a traffic stop on February 12, 2006, involving Davila. *Id.* at 32:13–15. During the stop, the officer found a small amount of marijuana on Davila's person, a loaded 9–millimeter pistol under the front seat of Davila's vehicle, and a brick of marijuana in the back seat of the vehicle. *Id.* at 44:5–6, 44:16–24, 46:1–2. Officer Moses noted that while Davila was cooperative at the beginning of the traffic stop, his demeanor changed when he was placed in the back of the officer's car. *Id.* at 47:1–15. Davila became verbally abusive with the officers. *Id.* During the course of Davila's transportation to the jail, he was able to maneuver his handcuffs from behind his back to the front of his body, which posed a security threat. *Id.* at 57:6–15. The officer finally testified that although he would normally escort a detainee alone into the prison, the officer felt that Davila was a significant security risk, and the officer required four or five jailers to assist him in extracting Davila from the cop car and escorting Davila to the jail. *Id.* at 58:4–6.

***10** Charles Norton, a detention officer at the Tarrant County Sheriff's Department, additionally testified. He discussed one incident wherein he told Davila, who was using the payphone, to hang up the call and return to his cell so that the inmates could be administered their meals. *Id.* at 105:19–24. In response, Davila became argumentative with the officer and refused to end the phone call. *Id.* at 105:23–25. Davila then began "cussing out" the officer and eventually hung up the phone. *Id.* at 106:1417. He then stated, "You don't know who you're messing with, you need to check my resume." *Id.* at 106:20–24. Ultimately, Davila complied with the officer's commands. *Id.* at 108:1–14.

Several other officers testified regarding the security threat that Davila posed while he was incarcerated and awaiting trial. One officer testified that he noticed Davila's nails were long and filed to a point. *Id.* at 126:14–16. This posed a potential safety issue for the jail staff members because officers had been scratched by inmates in the past. *Id.* at 126:18–20. Another officer testified that during a routine inspection of Davila's cell, the officer found contraband in Davila's cell. *Id.* at 135:6–8. When the inspection ended, Davila was instructed to come to the door so that the officers could remove his handcuffs. *Id.* at 134:1–3. Davila moved the handcuffs from behind his back to his front, refused to allow the officers to remove the handcuffs, and became argumentative. *Id.* at 135:1–5. The officer eventually had

to spray Davila with "OC Spray"[3] to get him to comply with his orders. *Id.* at 135:9–10. The officer noted that Davila's behavior after he was sprayed was unusual because while most inmates become "more humble and ... embarrassed," Davila "was singing, making jokes and taunting other inmates still in their cell and other officers." *Id.* at 136:5–8. Another officer testified that when Davila was being transferred for a trial court proceeding, a hairpin was found in Davila's breast pocket of his jumpsuit. *Id.* at 182:21–24, 186:2–3. The officer noted that the hairpin was considered contraband because there was a "[p]ossibility that the hairpin could be used in a set of handcuffs, to get out of locking devices." *Id.* at 183:23–25.

Finally, detention officers testified about Davila's attempted escape from the jail where he was held prior to trial. The first officer to testify, Michael Thompson, noted that he was in charge of escorting Davila and four other inmates to the gym for their state-mandated recreation period. *Id.* at 160:12–13. Once the inmates were secured within the west gym, the officer went to complete paperwork. *Id.* at 161:15–19. However, as he was completing the paperwork, the inmates got the officer's attention and asked to move to the east gym because the floor of the west gym was damp. *Id.* at 162:14–20. As the officer moved the inmates to the east gym, three of them (including Davila) attacked the officer by punching and kicking him multiple times. *Id.* at 164:23–25, 165:1–4. The inmates took the officer's wallet and removed his keys from his holster. *Id.* at 166:9–14. The inmates then demanded an escape route. *Id.* at 166:17–24. The officer sent the inmates down the fire escape, knowing that it would lead them to a dead end. *Id.* Once the inmates left, the officer attempted to summon help. *Id.* at 168:1–12. He additionally noticed that his partner, Teresa Otterson, was also laying face down in the hallway in a pool of her own blood. *Id.* at 169:12–15. A fellow inmate who witnessed the attack noted that the inmates were hitting, kicking, and stabbing Officer Thompson. *Id.* at 115:1–3. He noted that as they were attacking the officer, they were saying, "I'll kill you, and you know, you don't know me, you don't know what I'm in here for. I have nothing to lose. How do you get out of this building?" *Id.* at 116:24–25, 117:1–2.

*11 A nurse who responded to the scene first found Officer Otterson. The nurse noted that Officer Otterson was lying face down with her arms stretched in front of her in a large pool of blood. *Id.* at 230:9–14. Although the nurse attempted to call her name, she did not respond. *Id.* At this point, the nurse feared that she was dead. *Id.* at 230:22–24. Once Officer Otterson regained consciousness, she was very disoriented and "had no idea that she really was even hurt." *Id.* at 231:10–14. Although she "kept rubbing at her hand and saying ... what is this, I'm just a mess, I've just got stuff all over me," she did not realize it was her own blood. *Id.* In addition, a maintenance worker employed through Tarrant County Facilities testified. He testified that he was working to replace some light bulbs within the jail facility and was riding on an elevator with Officer Otterson to retrieve the light bulbs. *Id.* at 243:2–4. As the elevator door opened, the maintenance worker noted that Officer

Otterson first walked out and was struck by an inmate wearing a cast. *Id.* at 243:15–19. The maintenance worker attempted to help Otterson. *Id.* As he was attempting to help her, he noticed that several inmates in various stages of undress and partially covered in blood spatter were approaching him. *Id.* at 245:123. He then turned and ran back onto the elevator. *Id.* at 247:1–8. An inmate then struck him in the face and broke his nose. *Id.* at 247:22–24. A crime scene investigator dispatched to the scene later found a shank[4] inside the gym. Trial Tr. vol. 23 at 70:13–6, ECF No. 11–25.

3. *Mitigating Evidence at Trial*

Trial counsel first presented Allen Dennis, the chief deputy over housing for the Tarrant County Corrections center. Dennis noted that he reviewed the reports authored by several officers regarding Davila's attempted escape and assault of corrections officers. *Id* . at 199:2–6. Based on his review, he determined that the pat down search of the inmates was inadequate, that Officer Thompson's radio had not been properly checked out, and that the east and west gyms had not been properly inspected. *Id.* at 200:5–24, 202:6–14. Dennis additionally noted that the job assignment process for detention officers changed after the incident such that officers were required to rotate their assignments on a regular basis. *Id.* at 203:11–19. Ultimately, Dennis determined that the incident occurred, at least in part, as a result of "complacent lack of safety practices by both the officers involved." *Id.* at 209:2–7. Notably, however, Dennis attributed the biggest factor driving the assault to the "fact that you had three very aggressive individuals that wanted to get out of jail, and they were willing to do just about anything to do that." *Id.* at 210:25, 211:1–3.

The jury next heard from Mario Davila, Davila's father ("Mario"). Mario noted that he was currently incarcerated and serving a 20–year sentence for murder. *Id.* at 220:10–17. Mario fathered five children, three of whom also spent time in prison. *Id.* at 223–24. He testified that he met Davila's mother when he was working in her father's mechanics garage. *Id.* at 225:11–13. At that time, he was around the age of twenty-four and she was thirteen. *Id.* at 242:1–5, 230:12–14. Mario testified that he had a somewhat tumultuous relationship with Davila's mother, Sheila Olivas, which was caused by Mario's drinking problem. *Id.* at 242:12–23. Mario was sentenced to prison when Davila was very young, and as a result, the burden to raise and care for Davila was largely placed on his mother. *Id.*

***12** Next, Emily Davila ("Emily"), Davila's sister testified. She noted that she and Davila were fathered by Mario Davila. Trial Tr. vol. 24 at 13:20–25, ECF No. 11–26. Although she had written to her father, she had never met him. *Id.* She further testified about her and Davila's poor relationship with their mother, Sheila Olivas. When Emily was thirteen, her mother advised her and Davila that they were the product of a rape. *Id.* at 23:18–20. When she was sixteen, Emily stated that her mother kicked her out of her home, forcing Emily to move in with her boyfriend and his family. *Id.* at 17:16–23. Davila was kicked out of the home when he

was fifteen; he moved in with a girlfriend and her family. *Id.* at 25:7–10. Before they left the home, Emily and Davila worked at a grocery store to help their mother pay the household bills. *Id.* at 27:1–2. Emily further related that she and her mother had previously been in physical fights requiring police intervention and resulting in Emily being put in jail. *Id.* at 30:17–25. In describing the environment in which she and Davila grew up, Emily testified that she would frequently hear gunshots and "would see all kinds of stuff on the ground. Condom wrappers here and there, needles here and there." *Id.* at 38:14–16.

The jury next heard from Sheila Olivas ("Olivas"), Davila's mother. She testified that she was taken out of school when she was ten-years-old. *Id.* at 51:23–25. She explained that, when she was thirteen, her father "placed" her with Mario Davila in exchange for Mario giving Olivas's father money. *Id.* at 53:16–23. She later conceived both Davila and Emily as a result of Mario sexually assaulting her. *Id.* at 54:11–15. Olivas received no prenatal care during her pregnancy with Davila. *Id.* at 57:2–6. Although she would often attempt to leave Mario as a result of his violent, alcoholic tendencies, Olivas's family would always "push" her back with him. *Id.* at 54:24–25, 55:1–8. Olivas additionally testified that as they were growing up, her children often witnessed bouts of domestic violence between Olivas and her romantic partners, some of which required police intervention. *Id.* at 66:16–18. Regarding Davila, Olivas testified that he was diagnosed with ADHD[5] when he was a child and had very poor vision. *Id.* at 69:22–24. He additionally had a difficult time controlling his temper. *Id.* at 99:22–25. Although he was prescribed Ritalin for his ADHD, Olivas quit administering the medication to him because "[w]hen he took it, ... he was like a zombie." *Id.* at 70:12–17. As a student, Davila "had good grades until high school." *Id.* at 71:1–2. When he was twelve or thirteen, Davila began wearing colored clothing suggesting that he was involved in gang activity. *Id.* at 71:14–25. Olivas often picked Davila up from school and he was "beat up." *Id.* at 82:14–15. His teachers additionally reported that Davila "was exhibiting behaviors that are unacceptable in the classroom, and at times [was] endangering the lives of other students in [the] classroom." *Id.* at 100:4–8.

*13 Davila's aunt, Debra Jones, also testified. Jones stated that she was Olivas's younger sister. *Id.* at 113:12. Jones and her two other sisters assisted Olivas in raising and caring for Davila and Emily. *Id.* at 120:17–19. At the age of fourteen, Davila moved in with Jones. *Id.* at 122:9–10. Jones noted that there were "issues" because Davila was "wearing red."[6] *Id.* at 122:17–22. Olivas sent him to live with Jones because she thought that Jones would be able to help Davila. *Id.* Jones noted that she attempted to help Davila by requiring him to attend church every week, having him go the Boys & Girls Club, and discussing gang-related issues with him. *Id.* at 123:7–14. Angela Jones, another of Davila's aunts, further testified that one of her six children (Davila's cousin) also was a gang member-

only he was a member of the Crip gang. *Id.* at 142:6–9.

Dr. Fallis, the psychologist who was hired by defense counsel to prepare a social history on Davila, also testified. In conducting her investigation, Dr. Fallis spoke with Davila, Olivas, Mario, Emily, and his aunt, Debra Jones. *Id.* at 184:17–25, 185:1–5. She also spoke with "a former teacher who remembered him from middle school, Lisa Walker [and] ... someone who runs ... a program through the Boys and Girls Club of Fort Worth and some program to keep kids outs of gangs. His name is Melvin Carter. And two of his associates." *Id.* She additionally reviewed Davila's school, medical, and penitentiary records. *Id.* at 184:5–10, 186:8–12. Dr. Fallis first noted that although Olivas received no prenatal care, Davila's birth was "normal." *Id.* at 190:7–10. Developmentally, Davila reached the early milestones, such as potty training, walking, and talking, at normal points in time. *Id.* at 191:11–20. When Davila first began his schooling, however, he began exhibiting behavioral problems, which included "[h]itting other kids, hitting his teacher, throwing furniture, running away from the teacher, interrupting the teacher, being very fidgety, just could not sit still. Being silly in the classroom. Having difficulty following directions." *Id.* at 192:7–11. His behavior issues were so significant that the school threatened to expel him from the first grade. *Id.* at 192:12–13. Davila was later diagnosed with ADHD and was prescribed Ritalin. *Id.* at 193:20–24. Although Davila's teachers reported that there was a "significant improvement in terms of not just his behavior, but also his academic performance" as a result of the Ritalin, Olivas decided to discontinue the treatment. *Id.* at 194:1–3, 213:9–12. Davila's records indicated that he had other behavioral issues in the fifth grade and was sent to an alternative school in the tenth grade. *Id.* at 195:1–5.

Davila was relatively uninvolved in any type of extracurricular activities-"no sports, no clubs, or other groups, apart from one brief period of playing soccer"-during his younger years. *Id.* at 195:1519. Because he was not involved in pro-social activities, Dr. Fallis noted that Davila was more vulnerable to developing problems later on in his life. *Id.* at 195:20–23.

***14** At the age of seven, Davila was administered an IQ test in which he performed significantly below average. *Id.* at 198:24. He also had very poor vision and was not encouraged or made to wear his glasses, which impaired his schooling. *Id.* at 200:4–8. Despite the fact that Olivas reported that he made excellent grades through elementary, middle, and high school, Dr. Fallis noted that Davila's records proved otherwise. *Id.* at 199:10–13. Instead, Davila's school records from fifth grade and on established that he received low grades, and sometimes failed his core classes. *Id.* at 201–03. Additionally, he received several failing grades on his state-mandated tests. *Id.* at 204:18–22. Dr. Fallis found that Olivas, who had only received a third-grade education, did not place an emphasis on education in Davila's life. *Id.* at 197:5–8. In support, she noted that Davila

was frequently absent from school.[7] *Id.* at 201:15–16, 205:16–21.

With respect to the quality of his relationships, Dr. Fallis noted that she could not find information suggesting that Davila had many friendships. *Id.* at 218:1–3. As a teenager, Davila dated and lived with much older women. *Id.* at 217:19–25 (noting that at age 15, Davila dated a 28–year–old woman and a 32–year–old woman). He also joined the Blood gang as a young teenager. *Id.* at 218:1114. Davila had very limited contact with his father as a child, and had no physical contact with his father after the age of two, when his father went to prison. *Id.* at 223:13–18. Dr. Fallis further detailed the pattern of crime within Davila's family: "Mario has brothers, these would be [Davila's] uncles, who are also incarcerated. Mario has fathered other children. These would be [Davila's] half brothers. They are also incarcerated. There's a lot of conflict amongst the family members who are not incarcerated. A lot of arguing and fighting. And there's also a significant history of substance abuse amongst the paternal relatives." *Id.* 225:23–25, 226:1–5. Davila further has a history of "mental health problems, substance abuse problems and learning problems." *Id.* at 252:13–25.

Ultimately, Dr. Fallis stated that Davila was vulnerable to several risk factors he experienced during his development:

> I believe that the risk factors that are pertinent in-in his case are the-the genetic factors that have to do with developing ADHD, the limited intellectual abilities. Being raised by a teenage mother. Having a limited attachment to her because he was the product of a rape. Having been exposed to neglect from his mother. Exposed to domestic violence in the home. Not having a father in the home. Finding out that the father he identified as his-as his dad was actually not his father. Finding out that his biological father was someone who is in prison for a violent crime.
>
> Not having the medication that assisted him in his schoolwork and his behavioral problems, the Ritalin continued. Not having a parent or a caretaker that pursued the academic assistance that he needed through school.
>
> ***15** Another risk factor would be not involving him in prosocial activities in his early childhood, his later childhood, his adolescence. Getting exposed to gangs in the school system and the neighborhood. And when the-the red flags arose that suggested he was getting gang-interested in gangs that there was not some intervention then.
>
> I think the-the generational problems, the ways that his own mother was treated and then how that affected her parenting of him was a risk factor. The growing up in a family that was in the lower socioeconomic strata was a risk factor. Being in a neighborhood that tends to be a high crime area was a risk factor. And being involved in a gang was a risk factor.

Trial Tr. vol. 25 at 20:10–25, 30:1–15, ECF No. 11–27.

During closing arguments, the State argued that Davila's violent history-including the armed robbery, murder, and capital murder all committed within one week and his later attempted escape from jail-supported a finding that he would be a future danger to society. *Id.* at 54:9–23. In response, defense counsel argued to the jury that their focus should be not on what Davila had done in the past, but instead on his capacity to change in the future. *Id.* at 58:22–25, 59:1–18. Trial counsel drew on testimony elicited during cross-examination of the State's gang expert that many experiences Davila had in his life such as ADHD, his poor family structure, his relationship with his mother, and socioeconomic status were risk factors for gang activity. *Id.* at 63:19–25. In addition, trial counsel referenced the State's expert's testimony that most gang members change and "mature" out of their behavior. *Id.* at 64:12–17.

With respect to the mitigation issue, trial counsel, although admitting that Davila made horrible choices in committing the crimes, focused on the choices Davila did not make: his teenage mother, his conception as a result of sexual assault, having a father who spent the majority of his life in prison, having no familial support from his grandparents, being raised in an environment that did not value education, growing up poor, and his lack of involvement in extracurricular activities. *Id.* at 67–70. Ultimately, trial counsel argued that Davila was "worth life" and deserved the opportunity to have time to change while in prison. *Id.* at 72–73.

4. *Mitigating Evidence Presented to State Habeas Court*

During the state writ proceedings, Davila hired mitigation expert Toni Knox to conduct a mitigation investigation to determine whether trial counsel found and presented adequate mitigation evidence through trial counsel's investigation. Am. Pet. 46, ECF No. 17. Knox testified about her findings at the state writ hearing and provided an affidavit. *Id.* at 47.

Knox noted that trial counsel failed to attempt to contact Davila's maternal step-grandmother, Rosa Jones Nash and Davila's aunt, Sandra Kay Vargas. State Habeas Clerk's R. (vol.1) 35, 38. Each of these individuals, however, refused to sign an affidavit. *Id.* at 146. In fact, when one of Knox's associates, James Hughes, went to meet with Nash and Vargas, he was met by males who "informed [him], in what [he] perceived to be a threatening way, that [he] needed to leave as the family did not want to get involved in [Davila's] case as they were fearful of some type of gang retaliation and just did not want to be involved." *Id.*

***16** Ethel Fay Jones–Silverio, Davila's aunt, provided an affidavit. *Id.* at 155. She noted that Mario Davila was a "gangbanger" who would steal from his family and did illicit drugs. *Id.* Olivas met Mario when he worked in her father's garage and pursued him. *Id.* Olivas would often sneak out of her home to meet Mario and stay with him overnight. *Id.* at 156. Prior to her relationship with Mario, and at the age of twelve, Olivas had been sexually active with a man who was thirty-years-

old. *Id.* According to Jones–Silverio, Olivas's testimony that she was "sold" by her father to Mario Davila was untrue. *Id.* Olivas did not treat Davila and his sister Emily in the same manner in which she treated her other children-she treated them like "outcasts." *Id.* As punishment, Olivas would often make Davila and his sister Emily stand in a corner for hours at a time. *Id.* at 157. Jones–Silverio saw permanent stains on the walls where Davila had cried on the wall and marks where his forehead had been pressed against the wall. *Id.* Olivas would also force Davila and Emily to work in the home and care for their younger siblings, and she would also force them to work outside the home so that she could take their paychecks. *Id.* at 158–59. These same facts were further established in an affidavit obtained from Lynda Jones Mireles, Davila's cousin. *Id.* at 163 (noting she saw tear streaks on the wall where Davila and Emily were forced to stand as punishment for not cleaning the home).

Olivas's sister-in-law, Elizabeth Olivas, also provided an affidavit. She reiterated that Olivas treated Davila poorly and would often hit him as punishment. *Id.* at 168. She noted that she was "sorry that [she] was unable to speak with [Davila's] defense attorneys at the time of his trial because [she] would have explained the effects that [Olivas] had on him growing up." *Id.* at 169. Additionally, she stated that she blamed Olivas for what happened to Davila. *Id.*

Finally, Emily Davila's boyfriend's mother, Lisa G. Wallace provided an affidavit. She noted that Olivas was very manipulative and would force Emily and Davila to give her their paychecks. *Id.* at 173. Davila lived in Wallace's home for a very short period of time after he got out of prison. *Id.* She noted that when Davila lived with her, he "abided by [her] rules and seemed to be doing well." *Id.*

C. Analysis (Claim 2)

The state trial court entered findings of fact and conclusions of law, which were adopted, in whole, by the CCA. *See* State Habeas Clerk's R. (vol.2) 331–345; *Ex Parte Davila*, 2013 WL 1655549, at *1. The Court reviews the findings of fact and conclusions of law under the standards set forth in 28 U.S.C. § 2254(d).

1. *Strickland Analysis–Prong 1*

Davila fails to establish his claim under the first *Strickland* prong. There are countless ways in which to effectively represent a capital defendant. *See Pinholster*, 131 S.Ct. at 1403 (quoting *Strickland*, 466 U.S. at 689). Here, the mitigation team consisted of two seasoned defense attorneys, an investigator, and a psychologist. Trial counsel also consulted with multiple doctors who advised them about gang membership and gang activity. State Habeas Rep. R. (vol.2) 37. Trial counsel made the decision to utilize Dr. Fallis as the mitigation specialist before the jury. The ABA Guidelines-which are not binding upon this Court-allow for the use of psychologists as mitigation specialists. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.4, cmt. 1003 (2003) (noting that counsel is free to allocate duties imposed by the guidelines to appropriate

members of the defense team, with two exceptions inapplicable in the instant case). Trial counsel was also able to use the State's expert, Dr. Sabir, to elicit helpful information to explain Davila's risks for gang involvement. Additionally, although Davila's Aunt Ethel Jones did provide an affidavit, she refused cooperate with trial counsel and did not want to testify at the time of trial. State Habeas Rep. R. (vol.2) 113–114. Keene also noted that both she and Ford talked with Lisa Wallace and sought her trial testimony, however, Wallace did not want to participate in the trial. *Id.* at 115. The Court finds that trial counsel's performance did not fall below a constitutionally acceptable level; thus, Davila's claim fails. *See Strickland*, 466 U.S. at 716. However, even if trial counsel's performance were deficient, Davila still cannot establish prejudice under prong two.

2. *Strickland Analysis–Prong 2*

*17 Here, as the trial court appropriately found, most of the evidence set forth in Davila's habeas petition was cumulative of the evidence presented at trial. During the sentencing phase, the jury heard that Davila did not form a normal bond with Olivas, and that Olivas treated Davila and his sister Emily in a neglectful and abusive manner. This was established through testimony regarding (1) Olivas being "sold" to Davila's father when she was thirteen and raising Davila and Emily without their father; (2) the role Davila and Emily had to pay in helping to financially support the family; (3) the bouts of physical violence between Emily and Olivas; (4) the fact that Olivas advised Davila and Emily at an early age that they were conceived through sexual assault; (5) the alcohol abuse and incarceration of Davila's father early in Davila's life; (6) Olivas kicking Emily and Davila out of the home when they were young teenagers; (7) Olivas failing to keep Davila properly medicated and not requiring him to wear his eyeglasses despite his poor vision; and (8) an extended family culture of crime and incarceration. To the extent new evidence from Olivas's relatives suggests that Olivas minimized her wrongdoing before the jury, the jury heard Dr. Fallis's testimony, which had the same effect. The jury was adequately informed of the abusive, neglectful, and manipulative environment in which Davila lived as a child. As a result, Davila failed to make the requisite showing that the additional mitigation evidence undermines confidence in the verdict. Courts must be "particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir.2009).

Further, not all of the witnesses discovered through the state habeas investigation would have provided helpful testimony at trial. Two of the individuals whom Knox identified-Rosa Nash Jones and Sandra Kay Vargas-refused to provide an affidavit to Knox. In fact, when Knox's associate attempted to meet with Jones and Vargas to secure their affidavits, he was threatened by their male family members and told that Jones and Vargas would

not provide an affidavit for fear of gang retaliation. Furthermore, Ethel Fay Jones–Silvero described Davila's gang activity when he lived in her home. She stated she came home to find red scarves hanging all over her apartment. She confronted Davila and his then live-in stripper girlfriend, stating that they could no longer stay with her because she feared retaliation from a rival gang.

In addition, whatever mitigating impact the additional information may have had on the jury would have been overwhelmed by the State's aggravating evidence. The jury learned that Davila posed a security threat to detention officers on several occasions when he was incarcerated. In fact, while he was incarcerated in the time leading up to trial, he and three other inmates attempted to escape from jail by brutally beating two guards and a maintenance worker. Each of the guards spent a considerable amount of time off of work as a result of the injuries they sustained in the attack. Additionally, the jury learned of Davila's violent criminal history including an instance where he and two of his cohorts robbed two individuals at gun point in the week prior to the capital murder. Other witnesses also testified about the cold-blooded murder of Darrell Ford committed only days prior to the instant capital murder. One witness noted the dead look in Davila's eyes after he shot and killed Ford.

***18** The minimal impact the additional mitigating evidence may have had on the jury would have also been overshadowed by the brutal facts of the murder. *See Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir.1999). Brandishing a high-powered SKS semiautomatic weapon, Davila opened fire into a group of several women and fifteen children who were celebrating a child's birthday party. Davila shot and killed a grandmother and a five-year-old girl. He injured three other children and an adult, who, through no act of Davila's, managed to survive. Comparing the mitigating and aggravating evidence, the Court finds that there is no "reasonable probability that, absent the error, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Sonnier v. Quarterman*, 476 F.3d 349, 356–57 (5th Cir.2007) (citing *Strickland*, 466 U.S. at 695).

Defense counsel's closing argument to the jury revolved around Davila's capacity to change for the better. However, further evidence of how bad Davila's childhood was may have only cemented in the jury's mind his inability to change and would have run counter to the chosen defense theory. *See Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir.2012), *cert. denied*, —— U.S. ——, 133 S.Ct. 1244, 185 L.Ed.2d 190 (2013) (concluding counsel's decision not to offer evidence of a defendant's troubled, impoverished, and disadvantaged background was reasonable because the evidence could suggest he was a product of his environment and therefore likely to be dangerous in the future). Further, the facts that Emily was raised under the same circumstances as Davila and yet managed to live her life differently, would dilute the mitigating impact of any additional

"difficult-childhood" evidence. *Guevara v. Stephens,* No. 13–7003, 2014 WL 3894303, at *5 (5th Cir.2014) (holding that any information about Guevara's difficult life in El Salvador would have been undermined by, among other things, his brother's clean record despite their shared childhood).

In sum, considering all of this evidence in its totality, the Court's confidence in the verdict is not undermined. *Cf. Wiggins,* 539 U.S. at 535 (reciting "powerful" overlooked mitigation evidence of severe privation and abuse while in care of an alcoholic, absentee mother; physical torment, sexual molestation, and repeated rape while in foster care; periods of homelessness; and diminished mental capacities); *Escamilla v. Stephens,* No. 12–70029, 2015 WL 680405, at *5 (5th Cir.2015) (affirming denial of ineffective assistance of counsel claim after finding no prejudice in case where no mitigation investigator was hired). The Court finds that the CCA's determination did not result in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; nor did it result in a decision based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1)-(2). Claim Three is denied. *See id.*

D. State Habeas Counsel's Performance (Claim 4)

*19 In Claim Four, Davila argues that state habeas counsel was ineffective during the state habeas proceedings by failing to properly litigate the ineffective assistance of trial counsel claim. Am. Pet. 91–102, ECF No. 17. Specifically, he states that counsel was "ineffective for failing to subpoena any of the witnesses (other than Toni Knox) to testify at the state writ hearing," and was "further ineffective for failing to gain anything more than a passing familiarity with the facts, hoping instead to 'wing it' by parroting Ms. Knox's report." *Id.* at 91–92. He appears to assert that, under *Martinez v. Ryan,* state habeas counsel's ineffectiveness precludes AEDPA deference and, perhaps, allows this Court to consider new evidence not presented in state court.[8] *See Martinez v. Ryan,* — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *Trevino v. Thaler,* — U.S. —, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013).

The ineffective assistance of trial counsel claim was previously adjudicated on the merits in state court. The "new" evidence presented to this Court in the form of an additional affidavit from Toni Knox does not render the claim unexhausted. *Ward v. Stephens,* 777 F.3d 250, 258 (5th Cir.2015). Because the claim is exhausted, there is no procedural bar asserted, and *Martinez* does not apply. *Brown,* 684 F.3d at 489 & n. 4. Moreover, the Court's review of the state court decision must be based only on the evidence that was before the state court. *Pinholster,* 131 S.Ct. at 1398. For the reasons previously discussed, the Court finds that the state court's rejection of the ineffective assistance of trial counsel claim was not unreasonable. *See supra* Part IV.C. The Court denies Claim Four.

V. ASSISTANCE OF APPELLATE COUNSEL (CLAIMS 3 & 4)

Through appellate counsel Mary Thornton ("Thornton"), Davila filed a direct appeal with the CCA. In the appeal, Davila raised fourteen points of error. After reviewing the merits of Davila's claims, the CCA affirmed Davila's conviction and sentence in an unpublished, unanimous opinion. *Davila v. State*, No. AP–76,105, 2011 WL 303265 (Tex.Crim.App. Oct.3, 2011).

In Claim Three, Davila now contends that Thornton failed to recognize and raise the claim that Davila was convicted through the use of an improper jury instruction. Am. Pet. 81–90, ECF No. 17. Respondent argues that the claim against Thornton is unexhausted, procedurally defaulted, and meritless because the jury instruction was proper. Davila asserts that any default may be excused because appellate counsel and state habeas counsel were both ineffective. *Id.* at 89–92, 97.

A. Procedural Bar

Generally, a federal court will not review the merits of a claim that a state court declined to hear as a result of the petitioner's failure to abide by state procedural rules. *Martinez*, 132 S.Ct. at 1316. This general rule is "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Id.* An exception exists to the general rule, however, if the petitioner can establish a showing of cause and prejudice. *Id.*

***20** Here, Davila claims that the exception set forth in *Trevino*, ——U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044, excuses his procedural default of the ineffective assistance claim against Thornton. *See* Am. Pet. 89–92, ECF No. 17. The Court previously determined that Davila's third claim appeared to be unexhausted and procedurally barred under *Coleman v. Thompson* because Texas's subsequent writ bar would prevent him from presenting the claim now in state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Mem. Op. & Order, Nov. 10, 2014, ECF No. 35. The Court also rejected his assertion that *Trevino* has been extended to excuse the default of claims against appellate counsel. *See Reed v. Stephens*, 739 F.3d 753, 778 n. 16 (5th Cir.2014). Finally, the Court held that ineffective assistance of appellate counsel cannot excuse the procedural default of a claim against said appellate counsel for the simple reason that such claims do not exist to be raised on appeal. They are logically raised, as Davila asserts, in state habeas proceedings.

Thus, the ineffective assistance claim against Thornton is barred, and *Trevino* does not provide an avenue for excusing the procedural default. Assuming, however, that Davila can avoid procedural default, the claim against Thornton is denied on the merits for the reasons discussed below. *See* 28 U.S.C. § 2254(b) (2) (stating that habeas relief may be denied on the merits, notwithstanding petitioner's failure to exhaust).

B. Appellate Counsel's Representation

Davila argues that Thornton was ineffective because she failed to challenge an improper statement of law given in response to the jury's question about transferred intent.

1. *The Instructions*

At trial, the jury was given the following instructions regarding capital murder:

> A person commits an offense of "capital murder" if he commits murder and murders more than one person during the same criminal transaction. A person commits an offense of "murder" if he intentionally or knowingly causes the death of an individual.
>
> ...
>
> A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> ...
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm; and both murders were committed during the same criminal transaction, then you'll find the Defendant guilty of the offense of capital murder.

*21 Trial Tr. vol. 20 (Court's Charge) at 5–8, ECF No. 11–22. During their deliberations, the jury sent a note to the trial court and asked the following:

> We need a clarification of the capital murder charge. In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others.

Clerk's R. vol. 9 (Jury Note 2) 1931, ECF No. 10–44. The trial court responded first with the following supplemental instructions:

> MEMBERS OF THE JURY:
>
> With regard to the charge of capital murder, the definitions of "intentionally" and "knowingly" on page 1 define the mental states referred to in the application paragraph on the top of page 2. These portions are repeated below:
>
> A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

Clerk's R. vol. 9 (Resp. Note 2) 1932, ECF No. 10–44. The trial court also sent a second supplemental response to the jury (of which Davila now complains). It read:

The Court gives the additional charge on the law as follows:

> "A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected."

Id. at 1933. Trial counsel objected to the second supplemental charge and asked the trial court to instead "send the original response the Court had regarding intentionally and knowingly ... [a]nd wait ... until the jury indicates they can't reach ... a resolution. And then at that point, submit the other special charge, if it's called for." Trial Tr. vol. 20 at 53, ECF No. 11–22. The trial court overruled the objection and sent the instruction to the jury. *Id.*

2. *Analysis*

In reviewing an ineffective assistance of appellate counsel claim, a court must determine (1) whether appellate counsel's performance was deficient, and (2) whether appellate counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. To establish deficient performance, a petitioner must show that "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins*, 528 U.S. 259, 287, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). To show prejudice, the petitioner must establish "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." *Id.* "Counsel need not raise every nonfrivolous ground of appeal, but should instead present '[s]olid, meritorious

arguments based on directly controlling precedent.' " *Schaetzle v. Cockrell*, 343 F.3d 440, 445 (5th Cir.2003) (citing *United States v. Williamson*, 183 F.3d 458, 463 (5th Cir.1999)).

***22** Davila argues that the trial court's second supplemental charge "contained an incorrect statement of the law because it failed to recognize that in Texas one must have the specific intent to murder at least two people to be guilty of capital murder; it is not enough that a person attempted to murder a single person, and accidentally killed two." Am. Pet. 82–83, ECF No. 17. Davila asserts Thornton was ineffective for failing to raise this issue on direct appeal.

The language given in the trial court's second supplemental instruction is taken from section 6.04 of the Texas Penal Code, which reads "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that ... a different person or property was injured, harmed, or otherwise affected." Tex. Penal Code Ann. § 6.04 (West 2013). Trial counsel objected to this instruction on the basis that the trial court should delay the charge until after the jury deliberated further, not on the basis that the instruction was an incorrect statement of law.

Respondent argues that this failure to object waived any error for appeal and that Thornton cannot be ineffective for failing to raise a claim that was not preserved for appeal in the first instance. Resp. 61, ECF No. 29. Davila argues that trial counsel's failure to object does not preclude appellate review of jury charge error, but only increases the degree of harm necessary for reversal. Am. Pet., 85. Specifically, Davila argues that, under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App.1985), jury charge error that is not preserved requires "egregious harm" for reversal, as opposed to a "some harm" standard when the error is preserved. As explained below, the Court finds no error in the charge and that any alleged error did not result in harm under either *Almanza* standard.

A Texas trial court may instruct the jury on the law of transferred intent as applied in a capital murder prosecution. *See Roberts v. State*, 273 S.W.3d 322, 331 (Tex.Crim.App.2008). Davila argues that the second supplemental instruction in this case was erroneous only because it violated the rule in *Roberts* that a defendant convicted of multiple-murder capital murder must have the necessary mental state (intent or knowledge) with respect to the number of victims killed. To ascertain whether the jury instruction was error, the Court examines the "charge as a whole instead of a series of isolated and unrelated statements." *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex.Crim.App.1995). The "transferred intent" instruction was not given to the jury in isolation; it was given to the jury along with the language taken from the court's charge that repeated the statutory definitions for "intentionally" and "knowingly" as well as the application paragraph for capital murder. Clerk's R. vol. 9, 1932–33, ECF

No. 10–44. In Texas, the application paragraph is the portion of the charge that authorizes conviction. *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex.Crim.App.2013). The application paragraph for capital murder clearly required that the jury find Davila caused two intentional or knowing deaths in the same criminal transaction. In the event the jury found that Davila killed only one person, the application paragraph did not allow the jury to convict Davila of capital murder. Thus, the jury charge, taken as a whole, does not violate the rule in *Roberts*.

*23 More to the point, the CCA specifically distinguished the facts of this case from *Roberts*, where the victim was a woman who, unknown to the defendant, was pregnant. The CCA noted that, in contrast, Davila intended to kill "the fat dude in the middle of the street" and three "guys on the porch," or, in other words, "four males, not two females." *Davila*, 2011 WL 303265, at *4. Any error in the charge was, therefore, harmless, because *Roberts* is not implicated: Davila intended to kill more people than he actually did.

Given the foregoing, the record does not show that Thornton unreasonably failed to discover a non-frivolous issue for appeal and does not show that the issue would have prevailed on direct appeal. Claim Three and Four are denied.

VI. FOURTH & FOURTEENTH AMENDMENTS– ADMISSION OF WRITTEN STATEMENTS (CLAIMS 5 & 6)

Davila next contends that the trial court erroneously admitted three of his written statements admitting to the commission of the capital murder offense and another of his statements admitting to the commission of an extraneous murder offense. Am. Pet. 103, ECF No. 17. Davila contends that the admission of these statements was erroneous under the standard set forth in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and against his rights under the Fourth and Fourteenth Amendments to the United States Constitution. *Id.* In response, Respondent argues that this Court is prevented from reviewing such alleged error under *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), because Davila had a "full and fair opportunity to litigate his Fourth Amendment claim [in state proceedings] and exercised the opportunity to do so." Resp. 68–69, ECF No. 29. In reply, Davila contends that *Stone* does not apply. Reply 26–31, ECF No. 33.

A. Applicable Law

In *Stone v. Powell*, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Davila argues that the Supreme Court's holding in *Stone* does not apply in capital cases, and that the Supreme Court has exclusively applied the rule in non-capital cases. Reply 27, ECF No. 33. However, the Fifth Circuit

has applied *Stone* to capital cases involving the death penalty and determined that it was prevented from reviewing a petitioner's Fourth Amendment claim as a result. *See ShisInday v. Quarterman*, 511 F.3d 514, 524–25 (5th Cir.2007) ("The Fifth Circuit applies the [*Stone*] bar as long as the state gives the defendant an opportunity to litigate the issue, whether or not the defendant takes advantage of the opportunity.") (citing *Janecka v. Cockrell*, 301 F.3d 316, 320–21 (5th Cir.2002)); *Busby v. Dretke*, 359 F.3d 708, 722 (5th Cir.2004) (noting Fourth Amendment claims are not cognizable in federal habeas corpus proceedings pursuant to *Stone*); *Jones v. Johnson*, 171 F.3d 270, 278 (5th Cir.1999) ("The state provided an opportunity for full and fair litigation of [petitioner's] fourth amendment claim prior to trial; we cannot reexamine this claim on federal *habeas* review."). The Court now turns to a review of the state court proceedings to determine whether Davila received a full and fair opportunity to litigate the Fourth Amendment issues of which he now complains.

B. Analysis

*24 The Supreme Court in *Franks v. Delaware* held that a defendant may challenge an affidavit supporting a search warrant on Fourth Amendment grounds if the defendant establishes that (1) misrepresentations within the affidavit are the product of "deliberate falsehood or deliberate disregard for the truth," and (2) that the statements were necessary to establish probable cause. 438 U.S. 154, 171–72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Here, during the state court proceedings, Davila moved to suppress "any and all oral and written statements of the Defendant in this cause, which were made to agents of the State." Clerk's R. vol. 1 (Mot. Suppress Statements), ECF No. 10–3. Davila further moved to suppress "the arrest warrant in this cause based on the affiant's knowing or intentional false statements or based on the affiant's disregard for the truth in making false statements." Clerk's R. vol. 9 (Mot. Suppress Arrest Warrant), ECF No. 10–44 (emphasis removed). The state trial court held a hearing and heard evidence regarding the validity of the arrest warrant and the voluntariness of the statements Davila gave while in custody. Trial Tr. vol. 16 at 170–288, ECF No. 11–18. The state trial court overruled each of Davila's motions regarding the validity of the arrest warrant and the voluntariness of his statements. *Id.* at 244:19–21, 299:2–6. Later during his trial, Davila again objected to the validity of his arrest warrant. *Id.* at 37:9–16. The state court provided an alternative basis for its original ruling denying Davila's motion to suppress. *Id.* at 37:20–25, 38:1–20. The issue was then submitted to the jury. The jury was instructed that, if they had a reasonable doubt about whether the affidavit for arrest contained sufficient probable cause to support Davila's arrest, they could not consider the arrest or any evidence derived from it. Clerk's R. vol. 9, 1923–24, ECF No. 10–44. The trial court's ruling was affirmed on appeal.

Because Davila was afforded a full and fair opportunity to litigate the Fourth Amendment issue, and did in fact litigate the issue, the Court finds that *Stone* applies to

bar this Court's review of the issue in the instant federal habeas proceedings. *Stone*, 428 U.S. at 494. As a result, the Court denies Claims Five and Six. *See id.*

VII. FIFTH, SIXTH, & FOURTEENTH AMENDMENTS– ADMISSION OF WRITTEN STATEMENTS (CLAIMS 7 & 8)

Davila next contends that the trial court erroneously admitted all four of his written statements because they were made involuntarily, in violation of the Fifth, Sixth, and Fourteenth Amendments. Am. Pet. 111, ECF No. 17. He argues that the statements were not given voluntarily because, as he was interrogated for seven hours, he did not have anything to eat or drink and did not use the restroom. *Id.* at 114–115. Respondent maintains that the statements were not coerced and were instead offered voluntarily. Resp. 76, ECF No. 29. Alternatively, Respondent states that even if the statements were obtained in violation of Davila's Fifth Amendment rights, "the Court must still deny relief because the admission did not have a substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 77. This claim was raised and rejected on direct appeal; thus, AEDPA deference applies.

A. Applicable Law

*25 In determining the voluntariness of a confession under the Fifth Amendment, a reviewing court applies the "totality of the circumstances" approach. *Rogers v. Quarterman*, 555 F.3d 483, 491 (5th Cir.2009). That is, the court considers "the suspect's age, experience, education, background, intelligence, and whether the suspect has the capacity to understand the warnings given to him, the nature of his rights, and the consequences of waiver." *Id.* The court further considers "[t]he circumstances of the interrogation, such as its length, location, and continuity." *Id.* . "A statement is involuntary if there existed official, coercive conduct that made it unlikely the statement was a product of the individual's free choice." *Id.* The Supreme Court has opined that "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n. 20, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

"The voluntariness of a confession is ultimately a legal determination ... [that] may also involve subsidiary factual determinations and mixed issues of law and fact." *Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir.1998). As a result, this Court will defer to the state court's determination of voluntariness as long as it was not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*; 28 U.S.C. § 2254(d)(1).

B. The Interrogation

In its analysis, the CCA set forth the following facts surrounding Davila's written confessions:

Detective Johnson testified that [Davila] was arrested and brought to the police station at about 1:40 p.m. on April 8th. Detectives Johnson and Boetcher met with him in an interview room where [Davila's] handcuffs were removed and he was placed in leg cuffs. He began the interview by asking [Davila] if he wanted "anything to eat or drink or anything like that. He said no. I do it that way every time. And then I advised him of his Miranda rights." [Davila] told Detective Johnson that he understood his rights and that "he freely, intelligently and voluntarily waive[d] those rights" and agreed to talk with the officers. "He was very relaxed. Just sat there kind of casual." [Davila] gave his first statement beginning at 4:00 p.m. and ended it at 4:25. He gave the second statement beginning at 6:47 p.m. and completed it at 7:22. The officers began taking the third statement at 7:38 p.m. and concluded it at 8:12. Detective Johnson said that he did not do anything to deny [Davila] his basic needs, did not prevent him from having liquids or food, and did not prevent him from going to the restroom. He took a picture of [Davila] lounging casually in his chair in the interview room. [Davila] does not appear to be under any stress or duress.

***26** On cross-examination, Detective Johnson again said that [Davila] appeared very relaxed; "[t]he whole thing was extremely friendly." [Davila] "never asked to go to the bathroom"; he never asked for fluids or food. Detective Johnson reiterated that he had offered, but [Davila] turned him down.

Detective Boetcher also testified and said that [Davila] gave his fourth statement beginning at 8:45 p.m. and completed it at 9:06. He said that [Davila] had used the restroom, but he did not specify when.

The trial judge entered oral findings into the record and stated, inter alia,

> [Davila] was offered nothing in exchange for these three statements. There was no force, threats, or coercion made by the police. He was lucid. Did not appear intoxicated. Never asked for a-food or for anything to drink.
>
> The court finds that the statements are freely and voluntarily made and are admissible.

Davila, 2011 WL 303265, at *7–8.

C. Analysis

Here, both state courts determined that Davila's confession was made voluntarily and knowingly without threats or coercion. The Court defers to those determinations unless Davila can prove otherwise by clear and convincing evidence. In his briefing, Davila again argues that because he was questioned for seven hours and "did not ask to use the restroom and was not given anything to eat or drink" his confession was involuntary. Am. Pet. 113, ECF No. 17. He fails, however, to establish how those facts demonstrate the involuntariness of his confession or offer any additional evidence of coercive or improper activity. Davila simply asks this Court to disagree with the state court's ruling by rearguing

the issues. The state trial court determined that Davila was offered nothing in exchange for the first three statements he gave; that the police did not force, threaten, or coerce Davila's confessions; that he was lucid and did not appear intoxicated; and that he never asked for food or anything to drink. Trial Tr. vol. 16 at 302:22–25, 303:1–3, ECF No. 11–18. Regarding the fourth statement, the state trial court found that Davila "[a]gain during that period of time, ... requested nothing" and that the statement was given freely and voluntarily. *Id.* at 303:12–13, 16–18. A state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Because Davila has failed to establish that the state court unreasonably rejected his claim that police coercion rendered his confession involuntary, Claims Seven and Eight are denied. *See* 28 U.S.C. § 2254; *Shisinday v. Quarterman*, No. H–06–814, 2007 WL 776680, at *23 (S.D.Tex.2007).

VIII. CONSTITUTIONALITY OF TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 37.071 (CLAIM 9)

Davila contends that the trial court erred by denying Davila's motion to preclude the death penalty as a sentencing option and declare Texas Code of Criminal Procedure Article 37.071 unconstitutional. Am. Pet. 116, ECF No. 17. Specifically, he argues that Article 37.071 is unconstitutional because it "allows for a death sentence without grand jury review of the punishment special issues in violation of the Fifth and Fourteenth Amendments." *Id.* In response, Respondent states that the Constitution does not require Texas's special sentencing issues to be presented in the indictment before the grand jury. Resp. 77, ECF No. 29. The state court rejected this claim on the merits on direct appeal.

A. Analysis

*27 The Fifth Amendment to the United States Constitution provides, in relevant part, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...." U.S. Const. amend. V. In *United States v. Robinson*, the Fifth Circuit held that, with respect to federal cases, "the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty, and its failure to do so ... is constitutional error." 367 F.3d 278, 284 (5th Cir.2004).

Davila argues that the *Robinson* holding extends to state-court prosecutions and requires that the aggravating and mitigating factors that a jury must consider in the sentencing phase of trial must be alleged in the indictment. Am. Pet. 117–18, ECF No. 17. Davila further asserts that "[r]elying on the Supreme Court's decision in *Ring v. Arizona*, the court in *Robinson* held that the Fifth Amendment demands that aggravating factors that render a defendant eligible for the death penalty are, in fact, elements of the offense," thus, "the government is required to charge, by indictment, those statutory aggravating factors." *Id.* at 116–

17. In turn, Respondent contends that the *Robinson* holding only applies to federal-court prosecutions. Resp. 78, ECF No. 29. Further, "[t]he special issues addressed at the punishment phase have nothing to do with the eligibility determination [to receive the death penalty], but instead are designed to narrow the jury's discretion in making the ultimate decision whether to impose a death sentence." *Id.* at 80.

As the CCA correctly stated, the Fifth Amendment right to an indictment in felony cases has yet to be extended to the states through the Fourteenth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). The Fifth Circuit has additionally noted that "in *Robinson*, [the court] addressed only the requirement of a grand jury indictment in a federal prosecution." *Kerr v. Thaler*, 384 F. App'x 400, 403 (5th Cir.2010). Neither the Fifth Circuit nor the Supreme Court has extended the requirement to the states. *Id.*

Further, in Texas, the eligibility determination regarding the death penalty is made at the guilt phase of trial according to the elements that were alleged in the indictment. *See Lowenfield v. Phelps*, 484 U.S. 231, 245–46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Texas Penal Code Section 19.03 sets forth the elements to establish capital murder, which are the aggravating factors that could render an individual eligible for the death penalty. The special issues addressed during the punishment phase of trial do not apply to the eligibility determination, but rather apply to narrow the jury's discretion in making the ultimate decision whether to impose a death sentence. *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) ("By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function."). As such, special issues are not an element of the offense that must be included in the indictment. *Granados v. Quarterman*, 455 F.3d 529, 536–37 (5th Cir.2006); *Rowell v. Dretke*, 398 F.3d 370 (5th Cir.2005); *Anderson v. Quarterman*, 204 F. App'x 402, 409 (5th Cir.2006). For these reasons, the Court finds that the CCA's determination was not an unreasonable application of Supreme Court precedent and this claim is denied on the merits. *See* 28 U.S.C. § 2254(d).

IX. CONSTITUTIONALITY OF TEXAS'S "10–12"[9] RULE (CLAIM 10)

***28** Davila next argues that the trial court erred by overruling his objection to the constitutionality of Texas's "10–12 Rule." Am. Pet. 130, ECF No. 17. Specifically, Davila maintains that Texas's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments. *Id.* In response, Respondent contends that Davila fails to demonstrate that the CCA's determination resulted in an unreasonable application of clearly established Supreme Court precedent. Resp. 81, ECF No. 29.

A. Applicable Law

Article 37.071 of the Texas Code of Criminal Procedure provides, in relevant part:

> (e) (1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:
>
> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.
>
> ...
>
> (f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:
>
> (1) shall answer the issue "yes" or "no";
>
> (2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree

Tex.Code Crim. P. art. 37.071 § 2(e)-(f).

B. Risk of Arbitrariness–Eighth & Fourteenth Amendments

Davila first argues that "[t]he 10–12 Rule affirmatively creates confusion in the minds of the jurors" because they "are first told that the jury as a whole 'shall' answer 'yes' or 'no' to each issue presented" then they "are subsequently told that ten or more jurors must be in agreement to give one set of answers and that they must be unanimous in order to give another." Am. Pet. 132, ECF No. 17. The statute provides, however, that the jury's inability to answer a special issue shall result in a life sentence. Tex.Code Crim. P. art. 37.071, § 2(g). And, section 2(a)(1) prohibits the court or counsel from informing the jury of the effect of a failure to agree on the special issues submitted. Tex.Code Crim. P. art. 37 .071, § 2(a)(1). As a result, jurors are not informed that a single juror could prevent the imposition of the death penalty, which is in violation of his Eighth and Fourteenth Amendment rights. *Id.*

The Supreme Court has rejected this argument in *Jones v. United States.* 527 U.S. 373, 381–83, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) ("In light of the legitimate reasons for not instructing the jury as to the consequences of deadlock, and in light of congressional silence, we will not exercise our supervisory powers to require that an instruction of the sort petitioner sought be given in every case."). In *Jones,* the Court held that a jury need not be told what happens procedurally when a verdict cannot be reached. *Id.* Although the jury cannot be "affirmatively misled regarding its role in the sentencing process," a court is not required to instruct the jury "as to the consequences of a breakdown in the deliberative process." *Id.* at 381–82. The instruction in Davila's case accurately recited the governing law. This sub-claim is denied on the merits. 28 U.S.C. § 2254(d).

C. Right to Individualized Sentencing–Eighth Amendment

*29 Davila next contends that he was denied his Eighth Amendment right to individualized sentencing because the 10–12 Rule misleads jurors regarding their individual ability to give effect to their belief on mitigating circumstances. Am. Pet. 140–44, ECF No. 17. Specifically, "[b]y instructing the jury that ten jurors are required in order to give a 'yes' answer, the Texas statutes ... prevent individual jurors from having a meaningful opportunity to consider mitigating factors." *Id.* at 144. In support, Davila cites to *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1998). In *Mills*, the Supreme Court determined that the jury instructions violated the Eighth Amendment because they may have prevented the jury from considering mitigating evidence unless the jurors unanimously agreed that a particular circumstance was supported by the evidence. *Id.* at 384. The Supreme Court has since explained that "*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy v. North Carolina*, 494 U.S. 433, 422–43, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Further, the Fifth Circuit has determined that *Mills* is not applicable to the capital sentencing scheme in Texas. *See Druery v. Thaler*, 647 F.3d 535, 542–43 (5th Cir.2011) (noting that the Fifth Circuit has refused to invalidate the Texas sentencing scheme based on the *Mills* decision); *Miller v. Johnson*, 200 F.3d 274, 288 (5th Cir.2000); *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir.1994) ("Under the Texas system, all jurors can take into account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance. Thus, *Mills* is inapplicable."). As a result, the Court denies this sub-claim on the merits. *See* 28 U.S.C. § 2254(d).

D. Right to Fair and Impartial Jury–Sixth Amendment

Finally, Davila argues that the 10–12 Rule "forces the jury to wonder what would happen were they ... unable to answer the special issues, possibly leads them to believe that an unacceptable third alternative other than life and death would follow, and then leaves them to draw upon their own preconceived notions in coming to a verdict." Am. Pet. 146, ECF No. 17. Davila appears to extend the arguments advanced with respect to the Eighth Amendment to the instant argument. Davila fails to offer any new case law or arguments apart from those that he previously offered. The Court previously found that Davila's arguments under the Eighth Amendment were without merit. *See* Part IX.C. Consequently, Davila has failed to carry his burden under 28 U.S.C. § 2254(d), and Claim Ten is denied.

X. JURY INSTRUCTION–BURDEN OF PROOF ON MITIGATION SPECIAL ISSUE (CLAIM 11)

Davila argues that the trial court erred by denying his motion seeking to instruct the jury regarding the burden of proof on the mitigation special issue. Am. Pet. 148, ECF No. 17. Davila contends that the court should have instructed the jury that the

burden regarding the mitigation issue lies with the State. *Id.* In response, Respondent maintains that there is no constitutional requirement for the State to prove an absence of mitigating evidence. Resp. 85, ECF No. 29.

A. Applicable Law

*30 Under Texas law, once a defendant is found guilty of capital murder, the jury is tasked with answering two special issues to determine whether the defendant will receive the death penalty. Specifically, the jury must answer the special issues unanimously to impose a death sentence. Tex.Code Crim. Proc. Ann. art. 37.071 § 2. The first of the two special issues requires the jury to assess the future dangerousness of the defendant. *Id.* § 2(b). The State must prove this issue beyond a reasonable doubt. *Id.* § 2(c). After answering the first special issue, the jury then addresses the issue of mitigation. *Id.* § 2(e)(1). The mitigation issue assigns no burden of proof. *Id.*

B. Analysis

Davila states that "[b]ecause [a negative answer to] the mitigation issue in the Code of Criminal Procedure Art. 37.071 § 2 (Special Issue Number Two) increases the maximum penalty for the crime of capital murder, Texas' statutory scheme is unconstitutional for not requiring this issue to be submitted, proved, and found by the jury beyond a reasonable doubt." Am. Pet. 149, ECF No. 17. The Fifth Circuit has addressed this issue and determined that "no Supreme Court or Circuit precedent requires mitigation to be proved beyond a reasonable doubt." *Kerr*, 384 F. App'x at 403; *Rowell*, 398 F.3d at 378. As a result, this claim is denied on the merits.

XI. REQUEST FOR HEARING

This Court previously denied without prejudice Davila's request for a hearing on Claims 2, 3 and 4 and stated that it would *sua sponte* consider whether a hearing is appropriate after a more thorough evaluation under the AEDPA. This Court has discretion to grant an evidentiary hearing if one is not barred under § 2254(e)(2). *Landrigan*, 550 U.S. at 473. In exercising that discretion, the Court considers whether a hearing could enable Davila to prove the petition's factual allegations which, if true, would entitle him to relief. *Landrigan*, 550 U.S. at 474. The Court also must consider the deferential standards in § 2254(d), which limit the Court's ability to grant habeas relief. *Id.* In practical effect, if the state-court record precludes habeas relief under the limitations of § 2254(d), a district court is not required to hold an evidentiary hearing. *Id.*; *Pinholster*, 131 S.Ct. at 1399.

Claim 2 was adjudicated on the merits and the state court's ruling was determined to be reasonable. 28 U.S.C. § 2254(d). Claim 3 is procedurally barred, with no available avenue excusing the default, and Davila fails to allege any facts that, if true, would entitle him to relief on that claim. Davila also failed to demonstrate that the ineffective assistance of state habeas counsel alleged in Claim 4 is relevant to the procedural or substantive viability of Claims 2 and 3. Habeas relief is therefore precluded by § 2254(d) and § 2254(b), rendering a hearing on these claims

inappropriate. *See Pinholster*, 131 S.Ct. at 1400–01; *Reed*, 739 F.3d at 778 n. 16.

XII. CONCLUSION

*31 Based on the foregoing, the Court **DENIES** Davila's petition for a writ of habeas corpus. In accordance with Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), and after considering the record in this case, the Court denies Davila a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. *See Miller–El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483–84, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); 28 U.S.C. § 2253(c)(2). If Davila files a notice of appeal, he may proceed in forma pauperis on appeal. 18 U.S.C. § 3006A(7).

SO ORDERED.

All Citations

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Footnotes

1 Robert Ford was unavailable to testify as a witness during the state habeas proceeding as he passed away weeks before the state habeas proceeding. State Habeas Rep. R. (vol.2) 27.

2 In her affidavit, Keene noted that she and Ford spoke with the following members of Davila's family: (1) his mother, Sheila Olivas; (2) his father, Mario Davila; (3) his sisters, Emily Davila, Cynthia Olivas, and Vivianna Olivas; (4) Emily Davila's mother-in-law, Lisa Wallace; (5) his girlfriend, Nicole Blackwell; (6) his aunts, Debra Jones and Angie Jones; and (7) Mario Davila's mother, brother, and niece. State Habeas Clerk's R. (vol.2) 274–78.

3 The officer testified that "OC Spray" is a form of pepper spray. *Id.* at 134:13–17.

4 An officer defined a shank as "a piece of metal or something sharp, hard ... wrapped with cloth at the bottom to protect from unintentional injuries by the user," which is typically used as a weapon. *Id.* at 70:24–25, 71:1–4.

5 The term ADHD was later defined as "attention deficit hyperactivity disorder." *Id.* at 213:1–4.

6 Jones testified that because Davila constantly wore red clothing, she was concerned he was involved in gang-related activity. *Id.* at 122:23–25, 123:1–2.

7 For example, Davila missed 20 days of school during his fifth grade year and 40 days of school during his ninth grade year. *Id.* at 201:15–16, 205:16–21.

8 To the extent Davila may be asserting the ineffective assistance of state habeas counsel as a substantive claim for relief, it is barred by Section 2254(i). 28 U.S.C. § 2254(i) (providing that the ineffectiveness or incompetence of counsel during state collateral post-conviction proceedings shall not be a ground for relief).

9 The "10–12" Rule, as used in the parties' briefing and throughout this Order, refers to Article 37.071, § 2(f)(2) of the Texas Code of Criminal Procedure.

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